Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM 1993

VINCENT SERENO,

Petitioner,

v.

EDUARDO PACUMIO, et al.,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Applying its consistent precedent, the Ninth Circuit refused to review petitioner's challenge to a verdict under 42 U.S.C. § 1983 because his trial counsel did not object to the court's complete failure to instruct the jury on the single cause of action on which the verdict was based.

1. Whether this Court should resolve the conflict between the Ninth Circuit and all other Circuits on whether the "plain error" doctrine permits review of erroneous instructions in civil cases even when there was no objection at trial.

2. Whether a civil rights claim under 42 U.S.C. § 1983 must include proof that the defendant's conduct was the legal or proximate cause of the plaintiff's injury.

LIST OF PARTIES TO THE PROCEEDING IN THE U.S. COURT OF APPEALS

VINCENT SERENO,

Appellant,

JAIME NIEVERA,

Appellee,

EDUARDO PACUMIO; NENITA PACUMIO; PATRICK and ROY PACUMIO, Minors, by their Guardian Ad Litem, Eduardo Pacumio; DANILO EVANGELISTA; JISELA EVANGELISTA; JAY and JASON EVANGELISTA, Minors, by their Guardian Ad Litem, Danilo Evangelista; FELICITO TORRES; SALUSTIA TORRES; LESTER and MERILEE TORRES, Minors, by their Guardian Ad Litem, Felicito Torres; JAIME NIEVERA; TITA NIEVERA; TERRELL and JAIMELENE NIEVERA, Minors, by their Guardian Ad Litem, Jaime Nievera; FELICITO NER; ANGELICA NER; JUSTIN NER, A Minor, by his Guardian Ad Litem, Felicito Ner; AUGUSTO GABRIEL, JR.; PRISCILLA GABRIEL; ALEXANDER and LOUIE GABRIEL, Minors, by their Guardian Ad Litem, Augusto Gabriel, Jr.; ANTONIO PILAPIL; and VIRGINIA PILAPIL,

Cross-Appellants,

VINCENT SERENO; REID SELOVER; ED LEE; ROGER HOGAN; JOEL BIBBY; and FRED PAIGE,

Cross-Appellees.

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PETITION FOR WRIT OF CERTIORARI

Vincent Sereno hereby petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in *Pacumio v. Sereno*, No. 92-15290, issued on October 5, 1993.

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A, at 1a-6a, *infra*) is unreported. The district court judgment affirmed by the court of appeals (Pet. App. B, at 7a-10a, *infra*) is unreported. The district court opinion on post-trial motions for judgment notwithstanding the verdict or for new trial affirmed by the court of appeals (Pet. App. C, at 11a-36a, *infra*) is unreported.

JURISDICTION

The decision of the court of appeals was issued on October 5, 1993. A timely application for extension of time to file a petition for writ of certiorari until January 18, 1994 was granted on December 22, 1993. *Sereno v. Pacumio*, No. A-509, ___ U.S. ___ (1993) (O'Connor, J.). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

The Fifth Amendment to the United States Constitution is set out in the Appendix (Pet. App. D, at 37a, *infra*).

Section 1983 of Title 42, United States Code, is set out in the Appendix (Pet. App. D, at 37a, *infra*).

Section 2106 of Title 28, United States Code, is set out in the Appendix (Pet. App. D., at 37a, *infra*).

Rules 1 and 51 of the Federal Rules of Civil Procedure also are set out in the Appendix (Pet. App. D., at 38a, *infra*).

STATEMENT OF THE CASE

Following their eviction from a campground near Merced, California, twenty-five plaintiffs lodged eleven different causes of action for discrimination and other constitutional injuries. After an eight-day trial, a single plaintiff was awarded $4,500 for the one cause of action on which the trial court did not instruct the jury. The plaintiffs' lawyers were awarded more than $100,000 in fees.

1. Ranger Sereno Responds to Reports of Disturbances Caused by Respondents at the Lake McSwain Campground

In 1989, Vincent Sereno was a Park Ranger for the Merced Irrigation District ("MID") at four campgrounds in Mariposa County, California. RT 549-50, 599-600, 1453-54.[1] In that capacity, he operated the MID water and sewage treatment facilities and maintained the campgrounds and recreation areas. RT 405, 462, 550. Sereno and other park rangers also had overall responsibility for the safety and security of the campgrounds, though they had no authority to act as law enforcement officers. RT 406, 455, 469-70.

On July 14, 1989, a woman complained to Sereno that Respondents were occupying campground sites she had reserved at Lake McSwain. Upon verifying the woman's reservation, Sereno approached Respondents, explained the problem, and asked them to move. Respondents refused. RT 551-60, 1440-43. Indeed, one member of their group became so angry that she yelled for a match so she could "burn the place up." RT 607-08.

For more than two hours, Sereno attempted to work out a compromise that would allow Respondents to use an adjoining site, offering them two free nights' camping for the inconvenience of moving. RT 560-61. When Respondents still refused to move, an argument ensued and Sereno placed a call to the Sheriff's office. After Sereno announced that Respondents had to move or leave the campground, Respondents agreed to move. RT 555-62, 1288. Respondents, all members of seven Filipino families, protested that they were being discriminated against. RT 558, 562.

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[1] Citations to "RT" herein are page references in the Reporter's Trial Transcript.

Later that night, Sereno had to return to the campground to ask Respondents to quiet down. RT 423-24, 565-66, 580, 1127-28.

The following afternoon, Sereno received a radio report of complaints about a noisy group at Respondents' camp site. As he approached the site with another ranger, Sereno was hailed by a camper who complained that Respondents were using a bullhorn, drinking, and being a "real problem." RT 570-71. The rangers observed that Respondents' group had grown from 12 to 25 people, was very noisy, and that there was evidence of drinking. They also observed Respondent Jaime Nievera using a bullhorn to call down to children at the lake and back to others in the campground. RT 420-21, 426-27, 437-38, 475-76, 575-76, 588-89.

2. Sereno Orders Respondents to Leave, and is Assaulted

Ranger Sereno approached Respondents, informing them that "due to the problems we had here last night and the ongoing problems today with the bullhorn and the complaints I received from campers, we are asking you to leave the park." Several of the Respondents became angry, while Nievera and others accused Sereno of discriminating against them. RT 430-33, 574-79, 584, 605-06. Nievera approached Sereno with his voice raised and the bullhorn in his hand. RT 782-83, 1125-26. Sereno told him to "back off." RT 584-85, 1180, 1194-95. Nievera's wife confirmed that Sereno told Nievera to "back off," explaining that Sereno "thought my husband is going to hit him because he was holding the bullhorn like this on his right hand." RT 1126.

Deputy Sheriff Roger Hogan soon arrived in response to a call for assistance from the rangers. Sereno told Hogan, and later testified at trial, that Nievera had tried to strike him in the face with the bullhorn, but he had parried the blow and it landed

on his arm. RT 584-85, 608-09, 655-56, 1466. Nievera testified at trial that he made no threats and struck no blows. RT 1034-37.

After learning from sheriff's deputies that they could be arrested if they did not leave, Respondents drove away honking their horns, yelling complaints of discrimination, and promising they would be heard from again. RT 531, 670, 834, 1297, 1330-31, 1471-72.

3. After Sereno Files an Incident Report, the District Attorney Charges Nievera with Assault

During the confrontation, Sereno told Hogan that he "wanted to seek a complaint through the D.A's office process." The following day, Sereno filed a report of Nievera's assault with his supervisor. Deputy Sheriff Hogan testified that he prepared an incident report based upon Sereno's statement. Although Sereno knew that his report would be sent to the district attorney, he never met with the district attorney or discussed the case with him. RT 596-97, 608-09, 1466-68.

After the district attorney filed assault charges, Nievera negotiated an agreement to serve a year of "District Attorney's probation." If Nievera committed any offense during that year, the assault charges "would then proceed." Otherwise, the charges would be dismissed. Pursuant to this agreement, the assault charge against Nievera was later dismissed. RT 797, 1055-57, 1090-92.

4. Respondents Sue for $1 Million in Damages

On July 13, 1990, twenty-five Respondents sued eleven defendants, including Sereno. The Complaint stated ten claims under the federal civil rights laws, and one for emotional distress, based on allegations that defendants "illegally evict[ed] them from the Mariposa County Lake McSwain Recreation Area . . . on the basis of race." The Complaint claimed that the defendants unlawfully denied Respondents access to public accommodation on account of their race, deprived them of equal

protection and of substantive due process, conspired to deny their civil rights, and intimidated them by threat of violence because of their race. The Complaint sought injunctive relief and damages of $1 million. ER 1-14, RT 7.[2]

The Eleventh Cause of Action — the only claim still at issue — alleged that defendants (ER 14):

> unlawfully retaliated against Plaintiff Jaime Nievera for protesting their demand that Plaintiffs immediately leave the Lake McSwain Recreational Area by arresting him and causing him to be falsely charged with an assault upon Defendant Sereno in violation of the free speech provisions of the First and Fourteenth Amendments and 42 United States Code Section 1983.

The Complaint elsewhere described this claim as based upon the "malicious[] prosecut[ion] of [Nievera] on a totally unfounded charge of assault and battery, which was subsequently dismissed." Nievera sought damages for "legal fees and costs and los[t] time from work" to defend against the assault charges. ER 2, 8.

5. The District Court Wholly Fails to Instruct the Jury on the Eleventh Cause of Action

Following eight days of trial, the district court instructed the jury. Although the instructions quoted from 42 U.S.C. § 1983 and explained the statute's general purpose, RT 1596-97,[3] they never identified the elements of the Eleventh Cause of Action that Sereno "unlawfully retaliated" against Nievera's exercise of First Amendment rights.

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[2] Citations to "ER" herein are page references in Sereno's Excerpts of Record filed in the court of appeals.

[3] The text of these jury instructions is set out at Pet. App. E, at 39a, *infra*.

Indeed, the one instruction concerning the "Essential Elements of Plaintiffs' § 1983 Claim" (ER 67) addressed the Fourth Cause of Action, a due process claim that six defendants unlawfully "interfered with plaintiffs' liberty interests" "by wrongfully evicting plaintiffs from Lake McSwain." ET 10, RT 1597-99.[4] That instruction did not apply to Nievera's retaliation claim. Whatever the reason for the absence of instructions on the retaliation claim, Sereno raised no timely objection to the omission.

6. All Defendants Prevail on Every Claim, Except Nievera's Retaliation Claim Against Sereno

Except for Nievera's retaliation claim against Sereno, defendants prevailed on every claim submitted to the jury. Pet. App. B, at 7a-8a, *infra*. On a special verdict form, the jury found that Sereno (ER 134-36):

> [d]id . . . wrongfully retaliate against Jaime Nievera for verbally protesting the alleged interference with plaintiffs' liberty interests and/or their eviction from Lake McSwain by filing a criminal incident report or seeking criminal charges against Mr. Nievera.

The jury also found, on the special verdict form, that "such conduct [was] a legal cause in bringing about harm or injury to the plaintiff." *Id.*[5]

The jury awarded Nievera $4,500 in compensatory damages, but denied him punitive damages. This judgment was multiplied more than twenty-five times by an award of $108,334.50 in attorneys fees, plus ten percent interest from January 1, 1991, and costs of $6,463.69. ER 219.

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[4] The text of this jury instruction is set out at Pet. App. E, at 39a-40a, *infra*.

[5] The district court had instructed the jury that a "legal cause of injury or harm is a cause which is a substantial factor in bringing about the injury or harm." RT 1599.

Respondents and Sereno each moved for judgment notwithstanding the verdicts and for a new trial. Sereno asserted that Nievera failed to adduce any evidence at trial that Sereno retaliated against Nievera "because of" his speech. Sereno also argued that the jury could not have found that he caused assault charges to be filed against Nievera because "the decision to bring charges . . . is solely vested in the District Attorney." ER 144-45. The district court denied the motions and entered judgment. Sereno noticed a timely appeal, and Respondents cross-appealed.

7. The Ninth Circuit: No "Plain Error" Review

On appeal, Sereno contended that the failure to instruct the jury on Nievera's retaliation claim was "plain error" and that the absence of such instructions was so prejudicial as to require reversal. Sereno further urged that plain error review of civil jury instructions is necessary to ensure fair trials and to prevent injustice. The Ninth Circuit refused to consider Sereno's assertion of plain error, however, holding that (Pet. App. A. at 2a, *infra*):

> "This court has enjoyed a reputation as the strictest enforcer of [Fed. R. Civ. P.] 51; we have declared that there is no 'plain error' exception in civil cases in this circuit." *Hammer v. Gross*, 932 F.2d 842, 847 (9th Cir.) (en banc) (plurality), *cert. denied*, ___ U.S. ___, 112 S. Ct. 582, 116 L. Ed. 2d 607 (1991).

Sereno also argued on appeal that Nievera failed to prove that his conduct was the legal cause of Nievera's alleged injury, *i.e.*, the district attorney's filing of assault charges against Nievera. The court of appeals failed to address this claim, and chided Sereno for supposedly miscasting Nievera's retaliation claim as a claim for malicious prosecution (Pet. App. A. at 3a, *infra*):

> Nievera was required to show only that Sereno intended to hassle Nievera as punishment for exercising his first amendment rights.

The court of appeals further found that "the jury could have concluded that Sereno filed a false report to punish and to retaliate against Nievera for protesting the eviction." *Id.*

REASONS FOR ALLOWING THE WRIT

In awarding damages on the Eleventh Cause of Action, the jury acted without any instructions from the court as to the legal elements of that claim. Although this total failure to instruct the jury was highly prejudicial to Sereno, the Ninth Circuit refused to address the error because trial counsel had not objected to the instructions as required by Fed. R. Civ. P. 51. In so doing, the Ninth Circuit reinforced the reputation it "has enjoyed" of recognizing no "plain error" exception to Rule 51.

The Ninth Circuit's refusal to recognize a plain error exception in civil cases conflicts with every other Circuit. A plain error exception preserves fundamental fairness and prevents injustice, as this Court recognized in dicta in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). This Court should resolve this conflict among the Circuits.

In addition, the court of appeals wrongly refused to recognize that proximate cause is an essential element of a retaliation claim under 42 U.S.C. § 1983. The district attorney's independent decision to prosecute Nievera for assault broke any causal link between Nievera's alleged injury and Sereno's conduct. Given the strong interest in protecting reports of potential crimes to prosecutorial authorities, this Court should review the role of proximate cause in § 1983 litigation. This Court has never addressed this important question.

I. THE NINTH CIRCUIT STANDS ALONE IN DENYING PLAIN ERROR REVIEW OF CIVIL JURY INSTRUCTIONS WHEN JUSTICE REQUIRES

Federal Rule of Civil Procedure 51 states that "no party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict. . . ." Notwithstanding this passage, every court of appeals other than the Ninth Circuit either has held or assumed that the failure to object to a jury instruction does not prevent reversal for plain error in a civil case when justice requires. *See, e.g., Morris v. Travisono*, 528 F.2d 856, 859 (1st Cir. 1976) (recognizing authority to reverse for plain error, but declining to do so); *MacEdward v. Northern Elec. Co.*, 595 F.2d 105, 109-10 (2d Cir. 1979) (reversing for "fundamental" error); *Choy v. Bouchelle*, 436 F.2d 319 (3d Cir. 1970) (reversing for plain error); *Furka v. Great Lakes Dredge & Dock Co.*, 755 F.2d 1085, 1089 (4th Cir.) (same), *cert. denied*, 474 U.S. 846 (1985); *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537, 541 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) (reversing for plain error); *Ivey v. Wilson*, 832 F.2d 950, 955 (6th Cir. 1987) (reversing for plain error); *Shearson Hayden Stone, Inc. v. Leach*, 583 F.2d 367, 370 (7th Cir. 1978) (recognizing "the power to reverse for plain error in an instruction" but declining to do so); *Beckman v. Mayo Foundation*, 804 F.2d 435, 438 (8th Cir. 1986) (reviewing jury instructions for plain error but finding none); *Ryder v. City of Topeka*, 814 F.2d 1412, 1428 (10th Cir. 1987) (recognizing that plain error would warrant reversal, but finding none); *Pate v. Seaboard R.R.*, 819 F.2d 1074, 1082-83 (11th Cir. 1987) (reversing for plain error); *Montgomery v. Virginia Stage Lines, Inc.*, 191 F.2d 770, 774 (D.C. Cir. 1951) (reversing, despite absence of objection at trial, on alternative ground that trial court improperly instructed jury); *Lummus Indus., Inc. v. D.M.&E. Corp.*, 862 F.2d 267, 270 (Fed. Cir. 1988) (following Fourth Circuit's recognition of plain error exception). *But see McGoni-*

gle v. Combs, 968 F.2d 810, 823 (9th Cir. 1992); *Hammer v. Gross*, 932 F.2d 842, 847-48 (9th Cir.) (en banc) (plurality), *cert. denied*, 112 S. Ct. 582 (1991).

As Professors Wright and Miller have observed, "[T]he Ninth Circuit stands alone in reading Civil Rule 51 literally and denying that there is any power to reverse for plain error an unobjected-to instruction in a civil case." 9 Wright & Miller, *Federal Practice and Procedure*, § 2558, at 674 (1971). The Ninth Circuit here refused to consider Sereno's contention that the total failure to instruct the jury on the legal elements of Nievera's retaliation claim was plain error, despite a strong showing of prejudice. This Court should resolve this conflict among the Circuits. *See* Sup. Ct. R. 10.1(a).

Indeed, this Court has assumed that civil jury instructions may be reviewed for plain error even without a timely objection. In *City of Newport*, *supra*, the petitioner sought review of a punitive damages award even though it had failed to object to the punitive damages instruction. Neither the district court, the court of appeals, nor this Court found that the lack of objection precluded review. This Court stated that the "plain error" exception to Rule 51 "is invoked on occasion by the Courts of Appeals absent timely objection in the trial court." 453 U.S. at 256. Indeed, the Court tacitly approved this practice, observing that (*id.*):

> "Plain error" review under Rule 51 is suited to correcting obvious instances of injustice or misapplied law.

Despite this endorsement, *City of Newport* did not rely on the "plain error" exception to review the punitive damages award. Rather, the Court relied upon its even broader authority to review a question that has been fully briefed and decided below. *Id.*, at 257. Citing its own plain error rule, now Sup. Ct. R. 24.1(a), and 28 U.S.C. § 2106, the Court held that "the interest of justice warrants our plenary consideration." *Id.*, at 257, nn.

15, 16. In so doing, the Court "express[ed] no view regarding the application of the plain-error doctrine by the Courts of Appeals." *Id.*, at 257, n.16.[6]

This case thus squarely presents the issue, left open in *City of Newport*, whether Rule 51 permits a "plain error" exception.

The principal reasons for a "plain error" exception to Rule 51 are well established (*Hormel v. Helvering*, 312 U.S. 552, 557 (1941)):

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

See Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966) (rules were "written to further, not defeat the ends of justice").

The contemporaneous objection requirement in Rule 51 serves important interests in efficient and expeditious resolution of cases. But when a party's right to a fair trial is at risk, appellate courts have both the "power and duty" to correct the error, even in the absence of a timely objection. *New York Central R.R.. v. Johnson*, 279 U.S. 310, 318-19 (1929) (reversing despite absence of exception at trial). Core principles of fairness, embodied in the Due Process Clause of the Fifth

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[6] The dissenters in *City of Newport* acknowledged that, "like other procedural rules, Rule 51 is susceptible to flexible interpretation when strictly necessary to avoid a clear miscarriage of justice." 453 U.S. at 274-75 (Brennan, J., joined by Marshall and Stevens, JJ., dissenting). The dissenters joined, however, "in leaving open the issue of the scope of exceptions to Rule 51, if any, to another day." *Id.*, at 275, n.4.

Amendment, support a plain error exception. *See Lassiter v. Department of Social Services*, 452 U.S. 18, 24, 33 (1981) (due process requires that "judicial proceedings [be] fundamentally fair").

Federal Rule of Civil Procedure 1 recognizes this constitutional requirement of fairness, providing that the Rules "shall be construed to secure the *just*, speedy, and inexpensive determination of every action" (emphasis added).[7] This first canon of construction strongly favors a "plain error" exception to Rule 51. *See MacEdward*, *supra*, 595 F.2d at 110 (relying in part upon Rule 1). Rule 1 "fosters the principle that the outcome of cases should turn on their merits rather than on technical issues of pleading and procedure." 2 *Moore's Federal Practice*, § 1.13[1] (2d ed. 1993) (*citing In re Coles*, 1 K.B. 1, 4 (1907) (rules of practice are intended to be "handmaid rather than mistress" of justice)). *See also Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (based upon Rule 1, reversing dismissal of appeal for defective notice).

Moreover, "[f]ew more fundamental errors with respect to a charge can be conceived" than submitting a claim to the jury "with what was tantamount to no instructions at all." *McNello v. John B. Kelly, Inc.*, 283 F.2d 96, 102 (3d Cir. 1960).[8] The failure to charge *any* of the elements of Nievera's retaliation

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[7] *See also* 28 U.S.C. § 2106 (any "court of appellate jurisdiction may . . . set aside or reverse any judgment . . . brought before it for review, . . . or require such further proceedings to be had as may be just under the circumstances").

[8] *Accord MacEdward*, 595 F.2d at 110 ("it is 'fundamental' that the charge cover the basic elements of an asserted claim or defense when, as here, the facts are in dispute"); *Stewart v. Hall*, 770 F.2d 1267, 1270-71 (4th Cir. 1985) (plain error in failing to charge jury concerning proximate cause element of tort claim). *Cf. Screws v. United States*, 325 U.S. 91, 107 (1945) (in civil rights prosecution, right to fair trial necessitated review "where the error [was] so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest").

claim resulted in a miscarriage of justice. Without instruction on the elements of that claim, the jury was left to guess at liability and was given unbridled discretion to award damages.

For example, the jury was given no guidance concerning causation under 42 U.S.C. § 1983, the central factual question in the case. The special verdict form asked whether Sereno's report was a "wrongful" retaliation for Nievera's verbal protest, and whether Sereno's conduct was the "legal cause" of Nievera's injury. But how was the jury to distinguish a report submitted as a "wrongful" retaliation from a report submitted from mixed motives of personal resentment and official duty? *See Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 285-87 (1977) (causation not established solely by proof that protected conduct was "motivating factor"). And how, without proper instructions, was the jury to decide whether the district attorney's decision to charge Nievera with assault broke the chain of causation for purposes of his § 1983 claim?

In the end, the jury was left to figure out the elements of Nievera's retaliation claim. That error was sufficiently plain, and sufficiently prejudicial, to compel appellate review.

II. A SECTION 1983 PLAINTIFF MUST SHOW THAT THE DEFENDANT PROXIMATELY CAUSED THE CONSTITUTIONAL INJURY

A proximate cause requirement is a necessary element of Nievera's retaliation claim. Any causal link between Nievera's injury and Sereno's conduct necessarily was severed by the district attorney's independent decision to prosecute Nievera. This Court has never addressed whether proximate cause is an element of a claim under § 1983. Application of the proximate cause requirement will ensure that public employees can report criminal activity without fear of unwarranted liability under § 1983.

General tort principles apply to § 1983 claims. *E.g.*, *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986) (§ 1983 damages "ordinarily are determined according to principles derived from the common law of torts"); *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978) (tort principles are the "starting point for inquiry under § 1983"); *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) ("§ 1983 is to be read in harmony with general principles of tort immunities and defenses"); *Pierson v. Ray*, 386 U.S. 547, 556-57 (1967). For example, *Carey* recognized that § 1983 damages for an injury cannot be awarded "without proof that such injury actually was caused" by the defendant's denial of the plaintiff's rights. 435 U.S. at 264. *See also Mt. Healthy*, 429 U.S. at 286 (noting that Court has formulated tests of causation "which [distinguish] between a result caused by a constitutional violation and one not so caused").

Several courts have held that a § 1983 plaintiff must prove that the defendant's conduct was the proximate cause of plaintiff's injury. *Margoles v. Tormey*, 643 F.2d 1292, 1293 (7th Cir.), *cert. denied*, 452 U.S. 939 (1981) (injury not proximately caused by provision of false information to licensing board because board made independent decision); *Hand v. Gary*, 838 F.2d 1420, 1427-28 (5th Cir. 1988) (causal chain broken in actions for false arrest and malicious prosecution, because grand jury and prosecutor acted independently); *McLaughlin v. Alban*, 775 F.2d 389, 391 (D.C. Cir. 1985) ("the element of proximate causation" is "necessary to establish the constitutional tort under § 1983"); *Ames v. United States*, 600 F.2d 183, 185 (8th Cir. 1979) (grand jury indictment broke any chain of causation linking FBI investigators to institution of criminal proceedings).[9]

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[9] Even the Ninth Circuit held, in previous cases, that proximate cause is essential to a section 1983 claim. *Arnold v. International Business Machines*, 637 F.2d 1350, 1355 (9th Cir. 1981); *Smiddy v. Varney*, 803 F.2d 1469, 1472-73 (9th Cir. 1986), *opinion modified*, 811 F.2d 504 (9th Cir. 1987).

Proximate cause principles protect the ability of public employees to report incidents to prosecutors or other decision-makers. As stated in *Grove School v. Guardianship and Advocacy Comm'n*, 596 F. Supp. 1361, 1368-69 (N.D. Ill. 1984):

> [S]o long as the decision maker is in a position to evaluate such derogatory information independently and to reject it if it lacks credibility, the information supplier cannot be held legally responsible for the resulting decision.

The Ninth Circuit held here that "the jury could have concluded that Sereno filed a false report to punish and to retaliate"; but the court of appeals never considered the uncontroverted evidence that the prosecutor made an independent investigation and decision that broke the causal chain. Pet. App. A, at 3a, *infra*. Without evidence that the prosecutor did not make an independent decision to charge Nievera, Nievera failed to prove that he suffered any constitutional injury from Sereno's report.

Although several courts of appeals have agreed that a finding of proximate cause must be made, their approaches have varied in determining when the causal link is broken by an intervening decision by another official to punish or prosecute. The importance of clarifying this issue was noted in *Smith v. Gonzales*, 459 U.S. 1005 (1982) (White, J., dissenting from denial of certiorari).

CONCLUSION

For all of the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the questions raised in this petition.

Respectfully submitted,

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APPENDIX A

FILED OCTOBER 5, 1993
NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDUARDO PACUMIO; NENITA PACUMIO, et al.,
Plaintiffs-Appellees-Cross-Appellants,

v.

VINCENT SERENO, et al.,
Defendant-Appellant-Cross-Appellee,

ROGER HOGAN, JOEL BIBBY, FRED PAIGE,
Cross-Appellees.

No. 92-15287, 92-15290
D.C. No. CV-90-00452-OWW

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted May 12, 1993
San Francisco, California

Before: POOLE, FERGUSON, and FERNANDEZ, Circuit Judges.

Vincent Sereno, a park ranger for the Merced Irrigation District (MID), appeals the jury's verdict in favor of Jaime Nievera on Nievera's claim that Sereno violated his first amend-

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

ment rights by filing a report claiming that Nievera assaulted him (No. 92-15290). The 25 plaintiffs,[1] members of seven Filipino families, cross-appeal the district court's denial of their motion for judgment notwithstanding the verdict (JNOV) (No. 92-15287). The plaintiffs claim that the defendants violated their substantive due process rights by requiring them to leave a MID campground without good cause. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

A. Sereno Appeal

Sereno argues that the district court erred by failing to instruct the jury on what he characterizes as Nievera's section 1983 malicious prosecution claim. He contends that he was denied a fair trial because the jury was never directed to examine the elements of a malicious prosecution claim. Moreover, aside from the lack of jury instructions, Sereno argues that the evidence cannot support liability against him because Nievera did not, in effect, show malicious prosecution.

1. Jury Instructions

The federal rules instruct that "[n]o party may assign as error the giving or the failure to give a[] [jury] instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51. "This court has enjoyed a reputation as the strictest enforcer of Rule 51; we have declared that there is no 'plain error' exception in civil cases in this circuit." *Hammer v. Gross*, 932 F.2d 842, 847 (9th Cir.) (en banc) (plurality), *cert. denied*, ____ U.S. ___, 112 S. Ct. 582, 116 L. Ed. 2d 607 (1991). "A Plain error exception to Rule 51 lacks the authorization that Criminal Rule 52(b) confers in

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[1] For simplicity, the 25 plaintiffs/cross-appellees will be referred to as simply the "plaintiffs." Similarly, the rangers and sheriffs will be called "defendants."

criminal cases." *Id.* at 848; *see also Elder v. Holloway*, 975 F.2d 1388, 1395 (9th Cir. 1991).

Here, Sereno admittedly failed to raise any objection to the jury instructions before the district court. Sereno's failure to object to the instructions precludes him from challenging them on appeal. *See Hammer*, 932 F.2d at 848. There is no plain error exception. *See id.*

2. Sufficient Evidence

Sereno claims that he is entitled to judgment as a matter of law because Nievera failed to establish a section 1983 claim for malicious prosecution. Sereno's arguments are plausible *only if* Nievera asserted a section 1983 claim based on malicious prosecution. Nievera states that his claim is and has always been for unlawful retaliation against the exercise of his first amendment rights. We agree.

Plaintiffs' complaint and trial brief clearly set forth retaliation claims. Throughout the entire proceeding, Nievera's claim was construed as one for retaliation. Sereno's motion for directed verdict did not claim that Nievera failed to establish the elements constituting a malicious prosecution claim. Rather, Sereno stated that directed verdict was warranted because the evidence failed to show that he acted to punish the plaintiffs for exercising their constitutional rights. As such, Nievera was required to show only that Sereno intended hassle Nievera as punishment for exercising his first amendment rights. *See Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990). Viewing the evidence in the light most favorable to Nievera, *see Jackson v. Gates*, 975 F.2d 648, 655-56 (9th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3732 (U.S. Apr. 5, 1993) (No. 92-1645), the jury could have concluded that Sereno filed a false report to punish and to retaliate against Nievera for protesting the eviction.

B. Plaintiff's Appeal

In their cross-appeal, the plaintiffs contend that the district court erred by failing to grant their motion for JNOV on the substantive due process claim. They argue that the defendants violated their due process rights by evicting them from the campsite without good cause. Plaintiffs also argue that the district court erred by granting qualified immunity to the sheriffs.

"The district court's decision to grant or deny judgment notwithstanding the verdict is reviewed de novo. . . . Denial of such a motion is appropriate if the evidence and its inferences, considered as a whole, and viewed in the light most favorable to the non-moving party, cannot reasonably support a judgment in favor of the moving party." *Jackson*, 975 F.2d at 655-56 (citation omitted). "Neither the trial judge nor this court is permitted to weigh the evidence or substitute its judgment for that of the jury, provided the jury verdict is supported by substantial evidence." *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1151 (9th Cir. 1988).

"To support a claimed violation of an individual's substantive due process rights, we have stated that the [defendant's] conduct must be clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Jackson*, 975 F.2d at 657 (internal quotation omitted); *see Federal Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 474 (9th Cir. 1991).

1. Rangers Sereno, Selover, and Lee

Viewing the evidence in the light most favorable to the rangers, a rational jury could have concluded that, as a group, the plaintiffs were rowdy, not inclined to follow the rules, inclined to break agreements with the rangers, a general nuisance to other people who had the right to enjoy the camp, and likely to become more difficult to control as the day wore on.

The jury could reasonably have gone on to decide that the rangers acted to preserve the safety and peace of the park, and did not arbitrarily and unreasonably evict plaintiffs in violation of their due process rights. *See Jackson*, 975 F.2d at 656. Thus, the district court did not err by denying plaintiffs' JNOV motion.

2. Sheriff Deputies Bibby, Hogan, and Paige

"Government officials performing discretionary functions enjoy qualified immunity from civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Barker v. Racansky*, 887 F.2d 183, 185-86 (9th Cir. 1989) (internal quotation omitted). "Therefore, regardless of whether the constitutional violation occurred, the officer should prevail if the right asserted by the plaintiff was not 'clearly established' or the officer could have reasonably believed that his particular conduct was lawful." *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991); *cf. Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). In determining whether an officer acted reasonably, the court should consider the facts and circumstances within the officer's knowledge at the time of the alleged constitutional violation. *Hunter v. Bryant*, ___ U.S. ___, ___, 112 S. Ct. 534, 537, 116 L. Ed. 2d 589 (1991) (per curiam). "The qualified immunity standard gives ample room for mistaken judgments." *Id.* (internal quotation omitted).

Here, the sheriffs acted based upon their personal observations and the information provided by the rangers. They reasonably believed that the eviction was lawful because plaintiffs were disruptive and a threat to park safety. The jury agreed with them in that respect. Thus, at the very least, the sheriffs were entitled to immunity.[2]

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[2] Plaintiffs argue that the sheriffs waived their qualified immunity defense by withdrawing the instruction from the jury and failing to reassert

Plaintiffs' request for attorney's fees incurred in defending Sereno's appeal is granted. The case is remanded for a determination of the amount of the appellate fee award. *See Ash v. Lake Oswego Sch. Dist.*, 980 F.2d 585, 590 (9th Cir. 1992).

AFFIRMED and REMANDED.

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it in their response to plaintiffs' motion for JNOV. We disagree. The qualified immunity instruction was withdrawn from the jury because it was one of law. *See Act Up!/Portland*, 988 F.2d at 873. Moreover, given the jury's verdict, the sheriffs did not need to assert immunity in opposition to plaintiffs' JNOV motion. Waiver is made of stronger stuff.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

EDUARDO PACUMIO, et al.

vs.

VINCENT SERENO, et al.

JUDGMENT IN A CIVIL ACTION
CV F-90-452-OWW

The plaintiffs' First claim for injunctive relief for violation of 42 U.S.C. Section 2000a is not triable by a jury and was heard and hereby considered by the Court. For the reasons stated in open court as an oral statement of decision the Court finds in favor of all defendants and against all plaintiffs as to this cause of action. Defendants' counsel shall prepare and submit within five days, Findings of Fact and Conclusions of Law in accordance with the oral statement of decision.

All other claims are triable before a jury, and said jury having rendered its verdict Judgment is entered as follows:

Second Claim: 42 U.S.C. Section 1981 Claim

Judgment is entered in favor of all defendants and against all plaintiffs.

Third and Fourth Claims: 42 U.S.C. Section 1983 Claims

Judgment is entered in favor of all defendants and against all plaintiffs.

Fifth Claim: 42 U.S.C. Section 1985(3) Claim

Judgment is entered in favor or all defendants and against all plaintiffs.

Sixth Claim: 42 U.S.C. Section 1986 Claim

Judgment is entered in favor of all defendants and against all plaintiffs.

Seventh and Eighth Claims: California Civil Code Sections 51, 57.7 and 52(A) Claims (Unruh Act)

Judgment is entered in favor or all defendants and against all plaintiffs.

Eleventh Claim: 1st Amendment U. S. Constitutional Claim: Retaliation

Judgment is entered in favor of plaintiff JAIME NIEVERA and against defendant VINCENT SERENO; damages are awarded said plaintiff in the amount of $4,500.

As to defendant Roger Hogan, Judgment is entered in favor of said defendant and against plaintiff Jaime Nievera.

Plaintiffs' motions to dismiss defendants County of Mariposa and Merced Irrigation District as to all claims, were granted.

Defendants' motions for directed verdict as to the plaintiffs' Ninth and Tenth Claims for emotional distress and for 42 U.S.C. 1983 based on a failure to adequately supervise individual defendants with prior knowledge of discriminatory attitudes and practices thereby maintaining a policy or practice or condoning or ratifying the denial of equal protection of the law in violation of the Fourteenth Amendment, were granted in favor of all defendants and against all plaintiffs.

Prevailing parties shall recover costs in accordance with law.

Date: November 12, 1991

JACK L. WAGNER, Clerk

By_____
Deputy Clerk

United States District Court
for the
Eastern District of California
November 12, 1991

* * CERTIFICATE OF SERVICE * *
Entry on Civil Docket

1:90-cv-00452

Pacumio

v.

Mariposa County

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on November 12, 1991, I SERVED and ENTERED on the civil docket a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) listed below, by depositing said envelope in the U.S. Mail; or by placing said copy(ies) into an inter-office delivery receptacle located in the office of the Clerk.

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Jack L. Wagner, Clerk

By:_____
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

EDUARDO PACUMIO; et al.,

Plaintiffs,

v.

VINCENT SERENO, et al.,

Defendants.

CV F-90-452-OWW

MEMORANDUM OPINION AND ORDERS RE PLAINTIFFS' MOTIONS FOR JUDGMENT NOV OR FOR NEW TRIAL OR TO ALTER OR AMEND JUDGMENT AND DEFENDANT VINCENT SERENO'S MOTION FOR JNOV OR FOR NEW TRIAL

The motion of all plaintiffs for judgment notwithstanding the verdict or for new trial or to alter or amend judgment and of Vincent Sereno for judgment notwithstanding the verdict or for new trial came on for hearing January 3, 1992, in Department 2 of this Court. Plaintiffs were represented by their counsel Howard Moore, Jr., and Peter G. Cohen, Esq. Defendants Vincent Sereno, Reid Selover and Eddie Lee were represented by Flanagan, Mason, Robbins, Gnass & Corman by Michael Mason, Esq. Defendants Fred Paige, Joel Bibby and Roger Hogan were represented by Waltham & Dahlem by Stephen Dahlem, Esq.

On December 17, 1991, the jury returned verdicts against all 25 plaintiffs on ten of their claims. The jury found that plaintiff Jaime Nievera had been wrongfully deprived of his

First Amendment right to protest the basis for plaintiffs' eviction from Lake McSwain Recreation Area by his subsequent arrest. The jury awarded $4,500.00 damages.

Legal Standards

Judgment Notwithstanding The Verdict

Federal Rule of Civil Procedure Rule 50(b) permits a judgment notwithstanding the verdict to be granted where, without weighing the credibility of the evidence, there can be only one reasonable conclusion as to the proper judgment. *Hallmark Industry v. Reynolds Metals Co.*, 489 F.2d 8 (9th Cir. 1974). The operative question is whether there is evidence upon which the jury could properly find a verdict for the non-moving party. 9 Wright & Miller, Federal Practice and Procedure, §2524, P. 543.

A motion for directed verdict and the motion for judgment notwithstanding the verdict involve only the question of the legal sufficiency of the evidence. On the other hand, a motion for new trial is made on the ground the verdict is against the weight of the evidence and is addressed to the sound discretion of the Court. If the verdict is contrary to the preponderance of the evidence, the Court may set it aside and order a new trial, although a directed verdict is not justified. Moore's Federal Practice, 1990 Rules Pamphlet, Part 1, par. 50.10 at 459.

In ruling on a motion for judgment notwithstanding the verdict, the Court must view the evidence in the light most favorable to the non-moving party. 9 Wright and Miller, Federal Practice & Procedure §2524, p. 543-544. The standard for granting judgment notwithstanding the verdict is precisely the same as the standard for directing a verdict. *Id.* §2537, at p. 599. The Court does not weigh the evidence and must draw all factual inferences in favor of the non-moving party. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545-554, 110 S. Ct. 1331, 1338 (1990).

Simply stated, the test is: "Without weighing the credibility of witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached." *Fed. Prac. & Proc., supra*, §2524, pp. 545-546.

Motion For New Trial

A motion for new trial is authorized under Federal Rule of Civil Procedure Rule 59(a). On a motion for new trial, the Court may consider the credibility of witnesses and the weight of evidence, which it may not do in considering a motion for judgment notwithstanding the verdict. *Fed. Prac. & Proc., supra*, §2531, p. 575.

The general grounds for a new trial are that the verdict is against the weight of the evidence, that the damages are excessive, or that for other reasons, the trial was not fair. The motion may also raise questions of law rather than substantial errors and omissions or rejection of evidence, or the giving or refusal of instructions. *Fed. Prac. & Proc., supra*, §2805, p. 37.

A motion to alter or amend judgment under Rule 59(e) must rely on one of three major grounds: (1) an intervening change in controlling law; (2) availability of new evidence; and (3) the need to correct clear error of law or prevent manifest injustice. *Natural Resources Defense Counsel, Inc. v. U.S. Environmental Protection Agency*, 705 F.Supp. 698, 702 (D. D.C. 1989). Rule 59(e) motions are not vehicles for bringing before the court theories or argument that were not advanced earlier. *Id.* at 701. Nor may the motion present evidence which was available but not offered at the original trial. *Ibid.*, at 702.

None of the parties have claimed that there is any error in the jury instructions nor in the admission or rejection of evidence at trial. The parties' motions are based on the sufficiency and the legal consequences of the evidence.

The motions in this case are timely. On November 12, 1991, judgment was entered on the jury's verdict. On November 22, 1991, plaintiffs filed their motions. *Landis Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1370-71 (9th Cir. 1987). Defendant's motions were filed November 22, 1991.

Plaintiffs' Motions

The Court will not here repeat all of the grounds raised and extensive oral arguments in support of the motions made by plaintiffs. The essential claim of plaintiffs is that each of them was, by the evidence, entitled to recover for a violation of the infringement of their civil rights under the due process clause of the Fourteenth Amendment, which prohibits state action which deprives any person of life, liberty or property without due process of law. Substantive due process is denied by arbitrary governmental action. *Smith v. City of Fontana*, 818 F.2d 1411, 1415 (9th Cir. 1987). Substantive due process protects any person from oppressive and intrusive governmental action. *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665 (1986).

Plaintiffs' motion are only as to the fourth claim. Each plaintiff claimed a liberty interest in the occupancy of campsite D-6 at the Lake McSwain Recreation Area[1] on July 15, 1989. 42 U.S.C. §2000a, California Civ. Code §51. Plaintiffs' fourth claim asserts the intrusion of park rangers and defendant Sheriff's Deputies onto their campsite to evict them was not authorized by law and constituted a deprivation of substantive due process. *Cohen v. Norris*, 300 F.2d 24, 31 (9th Cir. 1962).

During the evening of July 14, 1989, plaintiffs rented two overnight campsites at Lake McSwain, a place of public accommodation and a business establishment within the meaning of

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[1] Lake McSwain is owned and operated by the Madera Irrigation District (MID), the employer of defendant park rangers. Plaintiffs voluntarily dismissed MID during trial. They also dismissed all claims against Mariposa County.

California Civil Code §51. The parties agree that defendants could not evict plaintiffs from the campsite (a place of public accommodation or business establishment), unless good cause existed.

The parties differ in their interpretation of the meaning of "good cause" to justify eviction from a place of public accommodation. Plaintiffs argue that the California Supreme Court definition of *In Re Cox* (1970) 3 Cal.3d 205, 213-214, 90 Cal.Rptr. 24; requires a showing that a member of the public has committed an illegal act or an immoral act; otherwise, "the proprietor has no right to exclude or reject a person 'except for good cause,' and if he does so without good cause he is liable in damages." *Stouman v. Reilly*, (1951) 37 Cal.2d 713, 717. "Good cause" necessarily implies that the decision should be based on sufficient evidence and that the evictor should not act arbitrarily. *Id.* at 717.

While emphasizing personal characteristics in finding arbitrary discrimination, California cases have recognized that legitimate business may justify limitations on consumer access to public accommodations. *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1162, 278 Cal.Rptr. 614, citing *Cox* at p. 717. A business establishment may establish reasonable deportment regulations that are rationally related to the services performed and the facilities provided. *Harris, supra*, at 1162 citing *Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 95-96, 234 Cal.Rptr. 178.

To prove a deprivation of substantive due process under plaintiffs' fourth claim for relief it was not necessary to show any racial animus. *Bonano v. Thomas*, 309 F.2d 320, 321 (9th Cir. 1962). The parties stipulated that in evicting plaintiffs on July 15, 1989, all defendants acted under color of state law.

To determine plaintiffs' motions, the conduct of the Sheriff's Deputy defendants must be analyzed separately from that of the MID park ranger defendants.

The Motions As To Defendants Bibby, Paige and Hogan

None of the parties have cited to the U.S. Supreme Court's recent decision in *Hunter v. Bryant*, 112 S.Ct. 534 (Dec. 16, 1991); 91 Daily Journal D.A.R. 15444. *Hunter* deals with the issue of qualified immunity. The U.S. Supreme Court strongly criticized existing Ninth Circuit authority which would prevent resolving immunity questions at the earliest possible stage in litigation; i.e., "the question of immunity should not routinely be placed in the hands of the jury, but rather decided by the Court long before the trial." 91 D.A.R. 15445; citing *Mitchell v. Forsyth*, 472 U.S. 511, 527-529 (1985). The "true inquiry" is whether the law enforcement agent "acted reasonably under settled law in the circumstances," not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact. 91 D.A.R. 15445. Thus, "probable cause" in the case of an arrest or more generally, action by a law enforcement agent "in light of clearly established law and the information the officers possessed;" *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) is to be tested "at the moment the arrest was made . . ." *Id.* at 15445 citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

It is recognized that the qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986) "This accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Davis v. Scherer*, 468 U.S. 183, 196 (1984). Qualified immunity is available to police officers, who are "generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 896 (1982).

Here, as amplified by *Hunter*, the inquiry is: "Did the deputies' conduct in evicting the plaintiffs at the request of defendant park rangers violate clearly established statutory or constitutional rights of which a reasonable law enforcement person would have known on July 15, 1989, when they ordered plaintiffs to leave McSwain Lake Recreation Area? The deputies are to be judged by the facts and the circumstances known to them at the time and the reasonableness of their belief in the lawfulness of their actions in light of clearly established law based on information they then possessed.

The parties agree that "good cause" was necessary to justify plaintiffs' eviction. Plaintiffs contend "good cause requires performance of an unlawful or immoral act." *Stouman v. Reilley, supra*, 37 Cal.2d at 717. Lake McSwain was a place of public accommodation where each plaintiff was protected by "the same constitutional safeguards of equal protection and due process as are restraints under the penal law." *In Re Cox, supra*, 3 Cal.3d at 213-14; quoting *Orloff v. Los Angeles Turf Club*, (1951) 36 Cal.App.2d 734, 739 (1970).

Deputy Paige arrived at plaintiffs' campsite Saturday afternoon around 3:45 p.m. as a double unit with Deputy Bibby. The deputies had received a report of a verbal disturbance. Upon arrival, Deputy Paige stayed back to observe "whether any fight was going on." Deputy Paige heard "something about a bullhorn being used." He heard nothing about an alleged assault. He heard nothing about a disturbance the prior evening. Deputy Paige's state of mind was that he was told "either by Deputy Hogan or Bibby — that there had been some disturbance here and that MID was requesting the campers to leave." Deputy Paige observed campers that were very upset about leaving and some were starting to pack up. He heard no conversation between any of the plaintiffs and the rangers or the other deputies.

Deputy Paige had no direct interaction with any of the plaintiffs. "The campers started yelling and screaming about having to leave and the deputies would settle it down by explaining to them that they would have to leave due to the fact that the rangers want them to leave." Deputy Paige did not observe any problem at the scene.

Deputy Paige testified he was aware that the County of Mariposa, through the Sheriff's Department, would provide police protection and service to enforce State and Federal laws and County rules and regulations at McSwain Lake Recreation Area. Exhibit "I," par. A 1216.015. Deputy Paige was aware that plaintiffs complained they were being discriminated against. He made no investigation of the plaintiffs' complaints. He accepted the Rangers' and fellow deputies' statements as valid reasons and talked to no one but the Rangers. Deputy Paige acted to restrain the liberty of plaintiffs to prevent them from staying in the park. Deputy Paige testified that if the plaintiffs refused to leave they would be arrested for failure to obey a peace officer.

In fourteen years as a Deputy Sheriff for Mariposa County, Deputy Bibby had responded to approximately three to five disturbance calls at Lake McSwain Recreational Park. On only one occasion had persons been evicted. That was for fighting.

Deputy Bibby was called to the campsite of plaintiffs' July 14, 1989, regarding a reported disturbance. At the time of his arrival, the disturbance had been resolved. He told each spokesperson that Lake McSwain is a quiet campground and they like to keep it quiet. He requested that each group stay as far apart from each other as possible and have as little contact as possible to minimize conflict. He provided each spokesperson a copy of the park rules and had no further contact with either on July 14, 1989.

Deputy Bibby was dispatched on Saturday, July 15, 1989, to the Lake McSwain campground in regard to a "physical fight

of 16-20 people." Deputy Bibby viewed the scene upon arrival as a "potentially dangerous situation." There was no physical fight in progress. Deputy Bibby heard conversation between Deputy Hogan and Park Rangers then present about a disturbance the night before; an assault on Vince Sereno, a Park Ranger; and a disturbance on July 15, 1989. Deputy Bibby heard that Ranger Sereno "had been hit by one of the individuals in the campsite." Ranger Lee requested that the Deputies ask the people to leave. Deputy Bibby advised Ranger Lee that Ranger Lee would have to ask the campers to leave the camp as an agent of MID. Ranger Lee then asked the group of people to leave. The plaintiffs refused to leave.

Deputy Bibby then contacted his Sergeant, advised him of the situation, and was advised by his Sergeant to tell the individuals they would be subject to arrest if they refused to leave.

Deputy Bibby was told by one of the plaintiffs, a woman, that "it was basically discrimination."

Deputy Bibby described the procedure followed for law enforcement inside the park, when requested by the MID Rangers to assist them. Deputy Bibby stated:

> Basically, I treated as a private individual a property owner who was requesting an individual to leave their property. An analogy that I could use would be that of a motel in which a person operating a motel, be it a clerk or whatever, who I consider to be an agent of the motel, contact the Sheriff's Department and ask us to assist them in removal of an individual from a motel, and we get there, we contact the individual of the motel. That individual explains the reasons for the request to leave, and if that request is a valid reason and a lawful reason, then we will assist, but only to assist. They must ask the person to leave.

Deputy Bibby went on to state that he would have to have at least a valid reason "as he would interpret it" for asking people to leave. He stated that it was not his practice to get both sides of the story. Evictees usually knew why they were being asked to leave.

The basis for his request to the plaintiffs to leave was: "A disturbance the night before with this group of people. A complaint of noise. An assault on a Park employee." This report was provided by the MID Rangers. Deputy Bibby relied on what the Rangers said as the basis for his request to the plaintiffs to leave.

Deputy Bibby advised the spokesperson for plaintiffs that if they refused to leave they would be subject to arrest and that their children would be placed in Child Protective Service. Deputy Bibby acknowledged he had law enforcement responsibilities for Federal and State law in the McSwain Lake Recreational Area. Deputy Bibby made no investigation of the plaintiffs' claim that they were being discriminated against. Deputy Bibby relied only on the information from the MID Rangers to decide that the plaintiffs were not being discriminated against. Deputy Bibby's frame of mind was to try to keep the peace between the Rangers or the agents of the Park and the campers.

The third Sheriff's Deputy, Roger Hogan, did not go to Lake McSwain on Friday evening, but arrived before Deputies Bibby and Paige on July 15, around 4:00 p.m. in response to a call of verbal disturbance. Deputy Hogan was told by Park Rangers that the plaintiffs had a reservation dispute the night before; that loud noise and the use of a bullhorn and yelling of profanities had occurred and that one of the campers had attempted to strike Ranger Sereno in the face. When recalled for direct examination, Deputy Hogan stated that Ranger Sereno told him that Ranger Sereno raised his arm to shield his face and that Mr. Nievera's blow struck him on the forearm.

In prior cross-examination, Deputy Hogan testified inconsistently that an attempt to strike Ranger Sereno had been made and that there was no actual striking. Deputy Hogan said he was told the attempted blow missed. Deputy Hogan's testimony at TT 155:19-156:9 which was specifically focused on whether there was physical contact, establishes a clear basis on which the jury could find that Deputy Hogan's subsequent testimony was so inconsistent as to be a recent fabrication, not innocent misrecollection or misinterpretation, from which the jury could discredit the testimony of Ranger Sereno and Deputy Hogan about the striking incident between Jaime Nievera and Deputy Hogan. Deputy Hogan conducted no investigation at the site. Deputy Hogan also understood that as a Deputy Sheriff he was to enforce State and Federal laws at Lake McSwain.

The Court has reviewed the entirety of the testimony of the three Deputy Sheriffs to determine their then existing knowledge of clearly established law and the information each arresting officer possessed about the circumstances that confronted them. Each Sheriff's Deputy understood that Federal laws against discrimination applied at the Lake McSwain Park and that they were responsible for the enforcement of such laws. Each Deputy Sheriff understood that the plaintiffs could not be requested to leave without valid reason ("good cause"). Each Deputy knew that MID had rules regulating deportment of campers within the park.

The Sheriff's Deputies had the specific duty to enforce local, state and federal law in the Park, particularly at the request of MID Rangers, who had general custody and control of the Park. The Deputies upon arrival at the site were provided information by the park rangers that a disturbance was in progress; about a disturbance of the prior night, a dispute over a campsite with other campers, about use of a bullhorn that caused other campers to complain about noise made by plaintiffs on July 15, 1989; and about an attempted striking or actual striking

of one of the Rangers by a member of the plaintiffs' group. The deputies received a specific request from the rangers to immediately remove plaintiffs from the park to keep the peace. Under the circumstances, even if the true facts were other than as reported to and believed to be accurate by the Sheriff's Deputies, their actions are measured by the standard of the reasonableness of their decision based on the information they possessed in light of clearly established law; all subject to their ability to be reasonably mistaken.

The Sheriff's Deputies' belief that evicting the plaintiffs was necessary to keep the peace was based on the Rangers' reports of two separate disturbances, one the night of the 14th, one the day of the 15th; report of assaultive behavior by one of the plaintiffs against a Ranger; two instances of reported difficulties between plaintiffs and other campers; the observations of one of the Deputies who had been called to the park the prior night for a disturbance involving some of plaintiffs; and that a large group of unruly people had been requested to leave by Park Rangers and had refused. The Deputies were not unreasonable in acting on that information without investigation and without hearing plaintiffs' side of the dispute. It was not unreasonable for the Deputies to rely on the reports of park rangers with whom they worked on a continuing basis over the years. No circumstance of past unreliability of any ranger in reporting information to Sheriff's Deputies was shown to provide cause for the deputies to question the information furnished by the rangers. The evidence was sufficient to support the finding that the deputies were given stated reasons and an immediate request for assistance. They acted under circumstances they in good faith believed to be dangerous and in a manner they believed in good faith to be necessary to maintaining peace in the park.

It is not reasonable to require a law enforcement officer, faced with a request for immediate assistance by the park owner under reported circumstances of plaintiffs' apparent disturbance

of and/or dispute with other campers, their argumentative and noisy behavior, and the reported assaultive conduct to first conduct a full factual investigation and then mediate or otherwise attempt to determine fault and to ascertain who was telling the truth. Law enforcement officers cannot serve the functions of fact finder or arbitrator in the field when faced with a reported disturbance and breach of the peace by a large group in a remotely located area. Under the circumstances, the Sheriff's Deputies acted on information they believed in good faith to be accurate. The information was provided by Park Rangers who were known to the Deputies and who the deputies could reasonably presume reliable. No Deputy, except Bibby, had any personal knowledge of any plaintiff. No Deputy was shown to have any motive to harm any plaintiff. No deputy was shown to have a wrongfully discriminatory state of mind against plaintiffs. It is neither reasonable or feasible to expect the Deputies under these circumstances to act as mediators of what appeared to be a peace-threatening dispute.

The qualified immunity standard "gives ample room for mistaken judgments." *Hunter* at 15445; *Malley*, *supra*, at 343. Assuming, *arguendo*, that all plaintiffs' assertions are true, the Sheriffs had no efficient means to determine the truth and no effective method by which they could have controlled the situation, without taking custody of the plaintiffs at the campsite. The Sheriff's Deputies were entitled to qualified immunity because their decision to enforce the rangers' request for eviction of plaintiffs was reasonable, even if mistaken. *Anderson v. Creighton*, *supra*, at 641. The jury found in favor of the Sheriff's Deputies which makes moot the prior ruling of this Court denying their motion for directed verdict. Reasonable minds could differ on the collateral evidence of allegedly discriminatory or disrespectful conduct by Deputy Hogan toward plaintiffs. The jury chose to believe Deputy Hogan.

For all these reasons, the verdicts in favor of all deputy defendants were supported by substantial evidence. There is no manifest injustice in a finding of qualified immunity for each deputy. Plaintiffs' motions for judgment notwithstanding the verdict; new trial; and to alter or correct judgment as to defendants Paige, Bibby and Hogan, are DENIED.

Plaintiffs' Motions As To Rangers Sereno, Lee And Selover

Plaintiffs' motions as to the Park Ranger defendants rest on obviously different grounds. It was emphasized by their counsel that the Park Rangers are not law enforcement officers and did not act as such. The Rangers did not strongly urge that they are entitled to qualified immunity. Rangers Selover, Sereno and their counsel stated the Rangers had no law enforcement function. Even if, *arguendo*, the qualified immunity defense is applied, the reasonableness of the rangers' conduct raises different considerations from the deputies.

Whether the Ranger defendants can be found liable for violating plaintiffs' civil rights, i.e., their liberty interests to be free from eviction from public campsites they paid to occupy at Lake McSwain, without due process of law, is determined by whether "good cause" existed on July 15, 1989. Plaintiffs' cite California cases which have examined "good cause" in deciding issues of exclusion from business establishments or places of public accommodation. *Stoumen v. Reilley, supra*, 37 Cal.2d at 716; *In Re Cox, supra*, 3 Cal.3d at 214. "Good cause" necessarily implies that revocation of a permit should be based on sufficient evidence and should not be arbitrary. *Id.* at 717; see also *Rolon v. Kulwitzky* (1984) 153 Cal.App.3d 289, 292, 200 Cal.Rptr. 217.

Ranger defendants misperceive entirely the civil rights claim brought by plaintiffs for a denial of substantive due process under 42 U.S.C. §1983. Due process prevents the

arbitrary use of Government power to interfere with the liberty interest of a citizen in violation of the Fifth and Fourteenth Amendments. *Smith v. City of Fontana, supra*, 18 F.2d at 415. If the eviction from a place of public accommodation plaintiffs had paid to inhabit was not authorized by law (i.e., was arbitrary or unjustified), the action of defendants under color of state law to deprive plaintiffs of their liberty violates their civil rights. *Cohen v. Norris*, 300 F.2d 24, 31 (9th Cir. 1962). The question of by what standard "good cause" is established is most appropriately decided by reference to state law; for the park rangers claimed their interference with plaintiffs' right to patronize the Lake McSwain Recreational Area was premised on the terms of plaintiffs' permit to be in the park, regulations of MID, and California state law, under which defendants purported to act. There is no independent federal law that defines the standard for removal from a California local public entity-owned recreation area.

Defendants' reference to the definition of "good cause" in federal wrongful termination of employment for age discrimination cases is not helpful. Defendants argue that "good cause" is measured by a subjective standard based on their determination that "a valid independent reason" existed to justify the eviction. The suggestion without citation of legal authority, that "the absence of a discriminatory purpose;" 'not probable cause' (defendant Memo p. 8:24-26) is the standard is simply wrong.

To evict plaintiffs who had paid MID to occupy campsites, defendants were required to show a breach of the implied contract stated by the permit and rules of MID,[2] which were furnished to plaintiffs and governed their occupancy, to justify its termination or revocation. That required proof of a violation of MID rules. Alternatively, proof of unlawful activity in the

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[2] Section 12.16.020 of the MID Regulations provides in subsection (6) that the permit required for occupancy may be revoked for any violation of this statute and state lands.

recreation area by plaintiffs or the conduct of immoral activities by plaintiffs was required. No claim is made of any immoral activities by plaintiff.

The Ranger defendants have advanced four reasons for evicting plaintiffs: (1) that plaintiffs' contentious conduct of the preceding night during the dispute over campsite D-5 and contemporaneous noise violated MID rules and the terms of the permit. [Ranger Sereno admitted he reached a complete settlement with plaintiffs regarding any problems of the night of July 14, 1989.] (2) Defendants violated MID rules pertaining to occupancy of reserved campsites the prior night by taking campsites D-5 and D-6, which were apparently reserved. [This ground was waived by the Friday settlement and as a matter of law, could not have been a reason for plaintiffs' eviction on July 15, 1989.] (3) Plaintiffs' conduct of July 15, 1989, which caused other campers to complain about noise, their use of a bullhorn, and utterance of alleged profanities. [There was no prohibition in the permit on MID rules against daytime noise. The only specific testimony adduced was Mrs. Clanton's that the man with the bullhorn said: "Stop that shit." No other evidence of any profanity whatsoever was offered.] (4) Occupancy on July 15, by more than eight campers on the campsite in alleged violation of the permit and MID rules. No other law is claimed to limit the number of campers present at a campsite.

[Plaintiffs claim that the defendants waived this requirement for Friday night by authorizing at least 12-14 campers' residence at campsite D-6 during the night of July 14, 1989, with express knowledge that additional campers were expected that night.]

There was conflicting evidence whether plaintiffs were advised that not more than eight campers could be present at the campsite during the daytime hours the following day. Ranger Sereno said he did, Mrs. Torres said he did not. Ranger Sereno knew that plaintiffs, by late Friday night, had purchased permits

for two campsites. This is direct evidence that all plaintiffs did not intend to occupy the same campsite the following night.

On July 15, plaintiffs held a family picnic. Many of the plaintiffs' children were in the water. There was no evidence that plaintiffs were ever previously advised that having 25 persons, from age 4 to 73, at least half of whom were children, present at such a family picnic at a single campsite during daylight hours violated MID rules. The evidence did not establish how many persons were simultaneously present at the campsite on July 15, 1989. Such conduct violated no law.

Defendants argue that they did not have to show probable cause to arrest plaintiffs in order to evict them. This statement is accurate. What the Ranger defendants had to establish to justify plaintiffs' eviction was "good cause" as defined above. Plaintiffs raise the fact that all 25 plaintiffs were evicted from Lake McSwain on July 15, 1989, even though at least 11 plaintiffs could not have violated any Park regulations whatsoever Friday night. It is necessary to consider the conduct of the plaintiffs of July 15, 1989, to determine good cause. There is dispute in the evidence about the level, intensity and duration of noise at the D-6 campsite on July 15, 1986.

Ranger Selover, who had no contact with the plaintiffs whatsoever the prior evening, made up his mind to evict plaintiffs July 15, 1989, based on what he heard from Ranger Sereno about the events of the prior night without any direct knowledge as to plaintiffs' conduct on July 15 and the second complaint about plaintiffs on July 15. Ranger Selover acknowledged that his authority to revoke the plaintiffs' permit to be in the Park was based on their violation of the Park rules or a state law.

When Ranger Selover first observed the plaintiffs upon his July 15, 1989, arrival at their campsite, the plaintiffs were sitting in the same fashion as people at other campsites. He testified the plaintiffs were "using the Park in an appropriate manner," except for the bullhorn and a radio they were playing. Ranger

Selover admitted that there was no applicable regulation governing noise and that he did not base his action on the noise regulation. Ranger Selover stated that he based his action on California Penal Code §415. (TT 25:25-26:1) Ranger Selover exhibited an erroneous understanding of California Penal Code §415: "My understanding and the interpretation that was explained to me in the courses that I took and the further training that I got was anything that was offensive to another could be construed under this section. That's what I was taught. Whether it's malicious or not." (TT 26:14-21)

Ranger Selover's decision to evict the plaintiffs was based on their reported conduct of the night before that he did not observe and a camper's complaint about the use of the bullhorn. Ranger Selover conducted no investigation whatsoever; did not talk to plaintiffs to hear their side; and only approached the plaintiffs to evict them from the site. (TT 29:12-30:8)

The decision to evict plaintiffs was made by Ranger Selover. Ranger Lee testified he had no options about the eviction on his arrival at the campsite July 15, 1989, "because the decision had been made." Ranger Sereno testified he did not make the decision; that Ranger Selover decided and Ranger Sereno agreed.

Ranger Selover's decision on the ground of noise was premised on his erroneous understanding of the law (Penal C. §415). His decision to evict based on conduct of the night before was unreasonable and unfair based on plaintiffs' agreement with Ranger Sereno and plaintiffs' acquiescence in his directions. The final ground, the number of campers on the site was made under conditions of ambiguity as to the number of campers actually on the site on July 15, 1989, and the uncertainty created by the settlement of the prior night.[3] If the number of persons at

[3] Contrary to plaintiffs' suggestion that excessive occupancy had been approved, Ranger Sereno testified he told Mrs Torres Friday night that later arriving campers would have to occupy another campsite. He was also told plaintiffs had more family arriving and needed two campsites.

the D-6 campsite on July 15, 1989, was truly a concern, no explanation was offered why plaintiffs were not then given the opportunity to divide into smaller groups on different sites. The regulation refers to occupancy of campsites which is itself ambiguous as to whether that means overnight occupancy or transitory occupancy, including social or related activities. There was no evidence that the 8 person occupancy limit was strictly enforced.[4]

No violation of any noise regulation occurred on July 15, 1991, for no regulation was in effect during daytime hours. No Park Ranger ever testified that he heard noise of a level that was offensive or intrusive to other campers. The reasonable course of conduct for any agent in charge of the Park would have been to instruct the plaintiffs: (1) not to use the bullhorn because other campers had complained and to keep radio noise down. There was no evidence that plaintiffs made any other type of noise on July 15. It defies credulity to suggest that a public family recreation area had to be maintained as a quiet zone during daytime hours on a Saturday afternoon.

Mr. Wright, a camper on the adjacent campsite, testified noise on Saturday was "not that loud." He did not complain about noise. All the evidence showed that Mr. Nievera's comments over the bullhorn were directed toward the lake and the plaintiffs' children who were in the Lake. His four-year old did not swim. The Rangers testified that the use of the bullhorn standing alone was not enough to justify eviction. Defendants argue that the "cumulative effect" of plaintiffs' conduct justified eviction.

Ranger Selover's refusal to inquire into whether plaintiffs presented any actual threat to the peace of the park and whether any complaints about noise or number of occupants at the

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[4] A number of plaintiffs testified that they observed other campsites occupied by more than eight campers and thought they were being discriminated against.

campsite could be easily and expeditiously resolved, manifest a closed state of mind. Absent from his decision was any consideration of Ranger Sereno's judgement of Friday night that a reasonable accommodation and resolution of the dispute over campsites could be and was reached with plaintiffs and that nothing in the plaintiff's conduct Friday night required their eviction. Ranger Sereno had thanked the plaintiffs for their cooperation. Plaintiffs' Friday night conduct proved they would accept direction and they in fact did comply with Ranger Sereno's directions. Although one or more female plaintiffs had been contentious Friday night, no plaintiff refused to comply with Ranger Sereno's orders. No evidence was offered to explain why, before the eviction decision was made, the Rangers had reason to believe that any plaintiff would not comply with further direction the next day.

After receiving the complaint about the bullhorn from the dispatcher, Ranger Sereno did not make any decision to evict the plaintiffs from the Park. Although he had firsthand knowledge of the plaintiffs, which was founded on his actual face-to-face communications and dealings with them the night before, he made no recommendation or decision to evict plaintiffs. Ranger Sereno was in the best position to make any decision. He abdicated to Ranger Selover, who had no contact, dealings with or firsthand knowledge of the plaintiffs.

The evidence demonstrated that, on Friday night, plaintiff Sally Torres argued with Ranger Sereno about campsites that had been posted as reserved for the Wrights. There is ample evidence to find this conduct was unreasonable, based on testimony of Ranger Sereno and the Wright family. No Ranger testified of any threatening conduct by any plaintiff on July 15 before the decision to evict was made. The alleged assault on Ranger Sereno cannot be used to justify the eviction. The decision to evict had been made prior to that incident. Ranger Selover had made the decision to evict before he reached the

campsite on July 15. He testified his only purpose in going to the campsite was to evict plaintiffs and that nothing would change his mind. No other post-decision conduct of plaintiffs is relevant to eviction, particularly post-notice protestations of plaintiffs to all defendants, plaintiffs' protests, horn-honking and related behavior. The only remaining bases for eviction were the number of campers, the complaint of another camper, and noise. Ranger Selover did not rely on the number of campers on the site as a reason for eviction. This strongly supports the inference that the advancement of that alleged ground was at best an afterthought, if not pretextual. The making of noise by use of a bullhorn in the manner described and by playing a radio at a family picnic do not suggest unlawful activity nor do they support a reason to believe that plaintiffs' were threatening the safety of others. The noise had disturbed other campers and caused a complaint.

At best, the evidence supported Ranger Selover's belief that the plaintiffs' were noisy and argumentative the night before and again on Saturday, causing two separate campers to complain. The circumstances that occurred after plaintiffs were told they had to leave and that nothing could change that decision has no bearing on justification for eviction.

Plaintiffs had a right under the First Amendment to protest unfair or arbitrary government action. *City of Houston v. Hill*, 482 U.S. 451, 461-63, 107 S.Ct. 2502, 2509-10, 96 L.Ed.2d 398 (1987).

The "cumulative" justification for the eviction was that the park was remote and the plaintiffs were too numerous, contentious, and noisy for one duty ranger to manage. Ranger Selover believed that plaintiffs presented a danger to the recreation area or anyone in it?[5] Plaintiffs had been argumentative, noisy and

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[5] Mrs. Clanton testified she told Mrs. Birmingham that there was a large number of people with a bullhorn that was real loud and noisy, "getting out of hand."

caused other campers to complain. From this the jury could find that plaintiffs presented a management problem to a single on duty ranger, and that there was a potential for further disruption.[6] From these combined circumstances the jury concluded that the Rangers were justified in requiring plaintiffs to leave the park. In a perfect world, this unfortunate dislocation to innocent family members would not occur.

Concerted action by a number of plaintiffs, who argued Friday night and at least one additional camper, Mr. Nievera, who acted on Saturday, did not afford the Rangers a reasonable basis to selectively evict only persons who threatened the peace and tranquility of the park. The plaintiffs numbered 25 persons who represented a number of family units, which the Rangers could not have been expected to break up. The Rangers were faced with what they believed to be a large argumentative group of persons who had caused complaints from other campers on two different occasions in less than 24 hours. With limited manpower, a remote location, and reasonable apprehension of continued trouble, the evidence was sufficient for a reasonable trier of fact to decide that the decision to evict was based on a good faith belief that to keep the peace in the park, there was no practical alternative to requiring the plaintiffs to leave. The rangers had a duty to maintain peace of the park for all its users. Their good faith action to protect the interests and tranquility of all present in the part constitutes good cause.

Although the Court as a trier of fact might reach a different result, in re-weighing, the evidence, the Court cannot say the verdicts against plaintiffs on the fourth claim are against the great weight of the evidence. Plaintiffs believe they were unfairly treated. They, however, were not blameless. The jury apparently accepted testimony that one of the campers asked for a match and threatened to "burn the place down" Friday night,

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[6] Mr.[sic] Clanton testified that her husband was irritated by plaintiffs conduct. The Clanton party celebrated when plaintiffs were evicted.

and testimony that after Mrs. Torres reached an agreement, other campers refused to accept the compromise and restarted the argument. The jury must have believed that at the time of eviction, plaintiffs represented a threat to the peace of the park. Objectively, the treatment of plaintiffs may have been unfair; the verdicts for the rangers, however, do not result in the manifest injustice which requires a new trial. There is no reason to believe that a new jury would reach any different verdict.

For these reasons, plaintiffs' motion for judgment notwithstanding the verdict as to defendants Sereno, Selover and Lee on the fourth claim is DENIED. Their alternative motion for new trial as to the fourth claim is DENIED, as is their motion to alter or amend the judgment.

Defendants' Motion For Judgment Notwithstanding The Verdict Or New Trial.

Defendant Sereno has moved for judgment notwithstanding the verdict or new trial relative to the jury's award of $4,500.00 in favor of plaintiff Jaime Nievera on the eleventh claim for retaliation against Nievera by reason of his exercise of his right of free speech. Defendant Sereno invokes his alleged First Amendment right to report the incident between himself and plaintiff Nievera to law enforcement authorities as justification for seeking the complaint. There is no First Amendment privilege for knowingly false speech.

Testimony established that defendant Sereno sought a criminal complaint against plaintiff Nievera. (TT 134:18-135:20) A substantial inconsistency in the testimony of Deputy Hogan, Ranger Sereno, and plaintiff Nievera, raised disputed issues of fact as to whether Nievera did anything the afternoon of July 15 but attempt to cease using and to hand his bullhorn to Ranger Sereno. Whether Ranger Sereno believed he was being assaulted by plaintiff Nievera; whether Ranger Sereno was struck by the bullhorn and whether any contact was made

with the person of Ranger Sereno by the bullhorn were all factual questions upon which the evidence was conflicting. No independent corroborating evidence of contact of the bullhorn with Ranger Sereno was adduced. These issues required the jury to decide which witness to believe and what version of the testimony to accept.

Ranger Sereno knew on July 15, 1989, that the plaintiffs protested their removal from the Park on grounds of discrimination. Plaintiffs told Ranger Sereno that he would be "hearing from them," as they left the park. The jury could reasonably have inferred that Ranger Sereno knew the plaintiffs would take civil action against him and that he sought a criminal case as a preemptive strike and/or retaliation against Nievera for Nievera's conduct in protesting what Nievera perceived to be racial discrimination against him. The jury chose to believe Mr. Nievera and to disbelieve Ranger Sereno. There was substantial evidence to support the jury's finding.

The First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. *City of Houston v. Hill*, 482 U.S. 451, 461-63, 107 S.Ct. 2502, 2509-10, 96 L.Ed.2d 398 (1987). The freedom of individuals to oppose or challenge police action verbally, without risking arrest, is one important characteristic by which we distinguish ourselves from a police state. *Id.*, at 462-63, 107 S.Ct. at 2510; *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990). Persons who act under color of state law, may not exercise the power at their disposal to punish individuals for conduct that is not only lawful, but protected by the First Amendment. *Duran, supra*, at 1378; *see, also, Buise v. Hudkins*, 584 F.2d 223, 229-230 (7th Cir.), *cert. den.*, 440 U.S. 916, 99 S.Ct. 1234, 59 L.Ed.2d 46 (1978) (Act in retaliation for exercise of Constitutionally protected right is actionable under 42 U.S.C. §1983, even if act, when taken for different reason, would have been proper.).

Mr. Nievera had a right to protest his eviction from the park. He had a right to express his belief that he and other plaintiffs were being discriminated against. He had a right to offer not to further use the bullhorn and to attempt to hand the bullhorn to Ranger Sereno. Such findings were easily inferable from the testimony received at trial. The jury had substantial evidence to find that Mr. Nievera's expressive speech, that he was being discriminated against on account of his race, was a substantial factor in causing Ranger Sereno to seek criminal charges against Mr. Nievera. Ranger Sereno stipulated that in so acting, he acted under color of state law.

The argument that Ranger Sereno did not "cause" the issuance of the complaint and prosecution of Mr. Nievera is inapposite. The prosecutorial discretion of the District Attorney that most directly resulted in the issuance of the complaint in no way abrogates the causal contribution of Ranger Sereno's request for a criminal complaint as a substantial factor in the criminal prosection of Mr. Nievera, the direct consequences of which were to cause Mr. Nievera out of pocket damage. Ranger Sereno pursued the complaint through the District Attorney's Office because he could not make a citizens arrest and the Deputy Sheriffs were not present when the alleged assault occurred. He testified that he sought to have the complaint issued. (TT 134:23-24) Ranger Sereno's request for a criminal complaint was the legal cause of Mr. Nievera's prosecution for attempted assault and his incurrence of legal fees and lost wages to defend a meritless criminal case. That Ranger Sereno's conduct is a concurrent cause in no way absolves him of liability for such vengeful conduct.

The jury's finding that Ranger Sereno wrongfully retaliated against Jaime Nievera for verbally protesting perceived racial discrimination and the alleged interference with plaintiffs' liberty interests and/or their eviction from Lake McSwain by

filing a criminal incident report and seeking criminal charges against Mr. Nievera was supported by substantial evidence.

Defendant Sereno's motions for judgment notwithstanding the verdict or new trial were DENIED.

Stipulation Re Costs

All plaintiffs and defendants Paige, Bibby and Hogan, by and through their counsel in open court on January 3, 1992, have stipulated and agreed, without prejudice to plaintiffs' motions for judgment notwithstanding the verdict, new trial, and to alter or amend judgment, that said defendants are prevailing parties in this action.

IT IS SO ORDERED.

DATED: January 16, 1992.

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Oliver W. Wanger
United States District Judge

APPENDIX D

U. S. CONST., AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit at equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be construed to be a statute of the District of Columbia.

28 U.S.C. § 2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

FED. R. CIV. P. 1

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

FED R. CIV. P. 51

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

APPENDIX E

EXCERPT FROM JURY INSTRUCTIONS

The next claim before you is based on Section 1983 of Title 42 of the United States Code, which provides "Every person, who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at lawsuit in equity or other proper proceeding for redress."

Section 1983 creates a form of liability in favor of persons who have been deprived of rights, privileges and immunities secured to them by the United States Constitution and federal statutes. Before 1983 was enacted in 1871, people so injured were not able to sue state officials or persons acting under color of state law for money damages in federal court. In enacting the statute, Congress intended to create a remedy as broad as the protection provided by the Fourteenth Amendment to the United States Constitution and federal laws. Section 1983 was enacted to give people a federal remedy enforceable in federal court because of concern that adequate protection of federal rights might not be available in state courts.

In order to prove their 1983 claim, the burden is upon the plaintiffs to establish by a preponderance of the evidence in the case the following facts: First, that defendants Sereno, Selover and Lee knowingly and unlawfully restricted or interfered with plaintiffs' liberty interests by unlawfully evicting plaintiffs from Lake McSwain.

As to Defendants Hogan, Bibby and Paige, that said defendants knowingly participated in the wrongful restraint and interference with the liberty interests of plaintiffs by wrongfully evicting plaintiffs from Lake McSwain.

Second, that the defendants' acts and conduct deprived the plaintiffs of their federal, constitutional right not to be denied or deprived of his or her liberty without due process of law.

Third, that the defendants' acts and conduct were the legal cause of plaintiffs' humiliation, embarrassment or mental anguish.

The parties have stipulated; therefore, it is established, that defendants in this case acted under color of law of the State of California.

The plaintiffs also claim punitive damages for the 1983 violation that is alleged. Punitive damages I have already explained to you. To establish their claim, plaintiffs must show by a preponderance of the evidence that one or more of the defendants deprived one or more of the plaintiffs of their liberty without due process of law in at least one of the ways claimed by plaintiffs; that is, plaintiffs must establish by a preponderance of the evidence that defendants unlawfully restricted or interfered with plaintiffs' liberty interests by evicting them from Lake McSwain.

Supreme Court, U.S.
FILED
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No. 93-1157

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

VINCENT SERENO,

Petitioner,

v.

EDUARDO PACUMIO, et al.,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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ISSUES PRESENTED FOR REVIEW

Whether Petitioner's assertion of a conflict among the Circuits with respect to enforcement of FRCP Rule 51 is nothing more than a frivolous and meritless effort on the part of the Petitioner to inappropriately avoid his responsibility for the judgment below.

Whether Petioner, a state officer, who the jury found to have violated the 1st Amendment rights of Respondent-Plaintiff Jaime Nievera, can obtain relief from a special jury verdict on that constitutional violation after trial when Petitioner never preserved an objection to the instructions or special verdict and waived his right to a jury trial on all issues relevant to the 1st Amendment claim pursuant to FRCP Rule 49(a).

Whether Petitioner, who agreed to try a case as a 1st Amendment civil rights case, agreed upon the jury instructions and the special verdict form without objection and then lost, can obtain relief from the jury verdict and the requirements of FRCP Rule 51 by simply recasting the case as a state malicious prosecution case and asserting a failure on the part of the District Court to instruct on the newly asserted malicious prosecution claim before the Ninth Circuit; and by now asserting a failure to instruct on the 1st Amendment claim in this Court.

LIST OF PARTIES
TO THE PROCEEDING
IN THE U.S. COURT OF APPEALS

VINCENT SERENO,

Appellant,

JAIME NIEVERA,

Appellee,

EDUARDO PACUMIO; NENITA PACUMIO; PATRICK and ROY PACUMIO, Minors, by their Guardian Ad Litem, Eduardo Pacumio; DANILO EVANGELISTA; JISELA EVANGELISTA; JAY and JASON EVANGELISTA, Minors, by their Guardian Ad Litem, Danilo Evangelista; FELICITO TORRES; SALUSTIA TORRES; LESTER and MERILEE TORRES, Minors, by their Guardian Ad Litem, Felicito Torres; JAIME NIEVERA; TITA NIEVERA; TERRELL and JAIMELENE NIEVERA, Minors, by their Guardian Ad Litem, Jaime Nievera; FELICITO NER; ANGELITA NER; JUSTIN NER, A Minor, by his Guardian Ad Litem, Felicito Ner; AUGUSTO GABRIEL, JR.; PRISCILA GABRIEL; ALEXANDER and LOUIE GABRIEL, Minors, by their Guardian Ad Litem, Augusto Gabriel, Jr.; ANTONIO PILAPIL; and VIRGINIA PILAPIL,

Cross-Appellants,

VINCENT SERENO; REID SELOVER; ED LEE; ROGER HOGAN; JOEL BIBBY; and FRED PAIGE,

Cross-Appellees.

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No. 93-1157

IN THE

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OCTOBER TERM, 1993

VINCENT SERENO,

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Respondent.

Petition for Writ of Certiorari to the
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for the Ninth Circuit

BRIEF IN OPPOSITION

Jaime Nievera, the Respondent herein, hereby opposes the petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in Pacumio v. Sereno, No. 92-15290, issued on October 5, 1993.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The First Amendment to the United States Constitution is set out in the Appendix [Res. App. B, at 11a, *infra*].

Rule 49(a) of the Federal Rules of Civil Procedure also is set out in the Appendix [Res. App. B, at 11a, *infra*].

STATEMENT OF THE CASE

This is a frivolous and meritless Petition for Writ of Certiorari. There are neither special nor important reasons to grant this Petition for Writ of Certiorari. The Ninth Circuit has not rendered a decision that is in conflict with the other circuits with respect to FRCP, Rule 51. In any event, Petitioner has utterly failed to preserve any objection to the challenged instructions not only pursuant to FRCP, Rule 51, but also pursuant to FRCP, Rule 49(a).

At the trial below, the jury returned a special verdict on behalf of Respondent Jaime Nievera that Petitioner Park Ranger Sereno violated his 1st Amendment rights, to wit, "by wrongfully retaliating against him for verbally protesting the alleged interference with plaintiffs' liberty interests and/or their eviction from Lake McSwain by filing a criminal incident report or seeking criminal charges against Mr. Nievera...." [Special Jury Verdict,

Res. App. A, pp. 8a-10a; ER 134-35]. In short, after protesting the eviction of himself along with twenty-four other Filipino family members and friends, [1] Mr. Nievera was forced to defend a false and meritless criminal allegation of assault by Sereno. As a result of this

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1 Mr. Nievera's family and friends are law abiding citizens who were candidly filmed on videotape on the afternoon of July 15, 1989 [Respondent's Trial Exhibit #1 - SER 295]. The District Court in its ruling on Count 1 at the trial below underscored this in two significant findings: 1) "The evidence has well established that the plaintiffs are law-abiding and good citizens of the United States, none of them ever having had any prior adverse experience with the law, criminal or civil." [SER 318:14-18]; 2) "A videotape in evidence shows activities of the plaintiff[s] that did not appear to involve excessive noise, did not appear to involve any types of unlawful behavior and did not involve any violations of the criminal law of the state or of the park regulations." [SER 319:15-20] There was also substantial evidence that Plaintiffs below are productive citizens holding positions of public service and those, who happen to be children, are aspiring to responsible careers. [RT: 743-746, 837-838, 257-258, 242-244, 940-942, 963-965, 284-285, 300-302, 165-166, 60-63, 312-313, 327-329, 1016-1020, 1092-1094, 340-341, 355-357, 1148-1149, 1209-1212, 367-368, 898-901, 915-917, 1204, 386-388, 708-710, and 630-631]

constitutional violation, the jury awarded Mr. Nievera $4,500 in damages, including $3,500 for attorney fees to defend the criminal prosecution, and $1,000 for loss wages and emotional distress damages. [Res. App. A, p.9a; RT: 1045]

Significantly, prior to the jury being instructed and retiring, there was an extended jury instruction and special verdicts conference with counsel for the parties and the District Court that lasted for no less than seven and a quarter hours and occurred over two days. [RT:1574:17-23] The initial proposal for special verdicts was made by and drafted by the defendants. [RT:1582:14-1583:3] Additionally, the trial judge at least twice invited counsel for Mr. Sereno for comments either to the jury instructions or the special verdicts. However, the Petitioner's counsel made no objection to either the jury instructions or the special verdicts with respect to the 1st Amendment claim. [RT: 1578:1-1582:4] Petitioner acknowledges on the face of the petition his failure to preserve any objection to the relevant instructions and jury verdicts. [Pet. pp. i and 7] On the record there was no preservation of any challenge to the instructions or special verdicts pursuant to either FRCP, Rule 51 or FRCP, Rule 49(a).

After trial, Petitioner moved for judgment notwithstanding the verdict or new trial asserting, *inter alia*, his own first amendment right of free speech.

However, consistent with the verdict, the District Court found that there is no First Amendment privilege for knowingly false speech; that Sereno sought the criminal complaint against Mr. Nievera [RT 134:23-24]; and that Sereno's request for the criminal complaint was the legal cause of Mr. Nievera having to travel to a remote and distant Mariposa County far from his home in the Bay Area to defend a meritless criminal case, incurring legal defense fees and losing wages; and that Sereno's conduct was a concurrent cause of the prosecution in no way absolves him of liability for such vengeful conduct. [Pet. App. C, pp. 33a-35a] These findings as well as the jury verdict were supported by substantial evidence. [Pet. App. C, p.36a]

Petitioner misrepresented the nature of the case before the Ninth Circuit in hopes of obtaining relief from the jury verdict below by recasting the case as a malicious prosecution case. However, there was no state malicious prosecution claim in the complaint [Excerpts of Record "ER" 1-14]. Nor was such a claim tried during the course of the proceedings below as underscored by the District Court's Pre-Trial Order [Supplemental Excerpts of Record "SER" 256-280] which does not list malicious prosecution as an issue for trial. Similarly, there was no jury verdict identifying a malicious prosecution claim for the jury to decide. [ER 125-136] On the contrary, the language that Petitioner attempted to

persuade the Ninth Circuit into believing was a malicious prosecution claim was in fact the jury verdict with respect to the 1st Amendment U.S. Constitutional Claim.[2]

The Ninth Circuit agreed with the District Court and Mr. Nievera that his claim was and has always been for unlawful retaliation against the exercise of his first amendment rights. Further, the Ninth Circuit rejected Petitioner's argument that there was insufficient evidence to support the claim and found that there was sufficient evidence for the jury to conclude that Sereno filed a false report to punish and to retaliate against Nievera for protesting the eviction [9th Circuit 10-5-93 Memorandum, Pet. App. A, p. 3a]

This Petition is yet another effort to obfuscate what occurred below and to obtain relief from a jury verdict that is solidly based on facts and law. Petitioner now suggests to this Court that there was no instruction with respect to the 1st Amendment §1983 claim; and there was a failure of proof that Sereno's conduct caused the constitutional injury to Mr. Nievera. However, viewing the jury instructions as a whole and the special

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[2] See Special Jury Verdict for Jaime Nievera's 1st Amendment U.S. Constitutional Claim [Res. App. A, pp. 8a-10a; ER 134-135]

jury verdict, it is clear that no instructional error occurred and both the special verdict and judgment were supported by substantial evidence. [Res. App. A, pp. 1a-10a]

REASONS FOR DENYING THE WRIT

I

CONTRARY TO THE REPRESENTATION MADE IN THE PETITION, THE NINTH CIRCUIT HAS NOT RENDERED A DECISION THAT IS IN CONFLICT WITH THE OTHER CIRCUITS WITH RESPECT TO THE ENFORCEMENT OF FRCP, RULE 51.

The Ninth Circuit and every other Circuit Court of Appeals apply Rule 51, Federal Rules of Civil Procedure, to bar litigation of objections to jury instructions raised for the first time on appeal. *Hammer v. Gross*, 932 F.2d 842 (9th Cir.1991), *cert. denied, sub nom., City of Newport Beach California v. Hammer*, ____ U.S. ____, 112 S.Ct. 582 (1991). [3] The pertinent part of Rule 51

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3 Even the cases cited by Petitioner to show existence of the exception reveal the universal and longstanding application of Rule 51. *Morris v. Travisono*, 528 F.2d 856 (1st Cir.1976); *MacEdward v. Northern Electric Co., Ltd.*, 595 F.2d 105 (2nd Cir. 1979): *Choy v. Rouchelle*, 436 F.2d 319 (1970); *Furka v. Great Lakes Dredge & Dock Company, Inc.*, 755 F.2d 1085 (4th Cir.1985); *Rodrigue v. Dixilyn Corporation*,

provides: "No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds for the objection."

Rule 51 is a rule of preclusion, which promotes the adjudicative ideals of Rule 1 to attain "the just, speedy, and inexpensive determination of every action." It "was designed to prevent unnecessary new trials caused by errors in instructions that the district court could have corrected if they had been brought to its attention at the proper time." *Robinson v. Heilman*, 563 F.2d 1304, 1306 (9th Cir.1977) A party who fails to object to the inclusion of an incorrect charge or the omission of a correct one waives the objection and is precluded from litigating the issue on appeal. *Woodbridge v. Dahlberg*, 954 F.2d 1231 (6th Cir.1992)

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620 F.2d 537 (5th Cir.1980); *Ivey v. Wilson*, 832 F2d 950 (6th Cir.1987); *Shearson v. Leach*, 583 F.2d 367 (1987); *Beckman v. Mayo Foundation*, 804 F.2d 435 (8th Cir.1986); *Ryder v. The City of Topeka*, 814 F.2d 1412 (10th Cir.1987); *Pate v. Seaboard Railroad, Inc.*, 819 F.2d 1074 (11th Cir.1987); *Montgomery v. Virginia*, 191 F.2d 770 (D.C.Cir.1951); and *Lummus Industries, Inc. v. D. M.& E Corporation*, 862 F.267 (Fed Cir.1988). [Pet. 10]

Rule 51 is a salutary rule of trial and appellate practice, which conforms to general trial and appellate practice. As stated in *Palmer v. Hoffman*, 318 U.S. 109, 119, 63 S.Ct. 477, 87 L.Ed. 645 (1943):

> In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial.

FRCP Rule 51, like Rule 30 of the Federal Rules of Criminal Procedure, requires a timely objection to preserve an instructional error but courts are less willing to forgive noncompliance. Appellate courts generally hold that the failure to make a timely objection and distinctly point out the matter to which the objection is directed bars a party from raising the issue on appeal. See cases cited in footnote 3; *Seltzer v. Chesley*, 512 F.2d 1030 (9th Cir. 1975); and *Standard Oil Co. of Calif. v. Perkins*, 347 F.2d 379 (9th Cir. 1965).

Even in criminal cases, application of the "plain error" doctrine is the exception rather than the rule. "Plain error arises

only in **exceptional circumstances** where we find that the trial court's decision affected substantial rights and where it is 'highly probable that the error materially affected the verdict.'" *United States v. Span*, 970 F.2d 573, (9th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1283 (1992). [Emphasis added]

In civil cases, the so-called "plain error" doctrine is a judicially created exception to Rule 51. All Circuit Courts of Appeals, including the Ninth Circuit, sparingly apply a variant of the "plain error" doctrine in exceptional circumstances to prevent a miscarriage of justice. In an appropriate case, the "plain error" exception is invoked to "correct the mistake made by court and counsel below." *Rodrigue v. Dixilyn Corporation, supra*, at 540.

> "The doctrine is not a routine by-pass to Rule 51, however. The criterion for application of this doctrine is 'certainly not whether [this] court approves or does not disapprove the results of the case.' *Shepard Federal Credit Union v. Palmer*, 408 F.2d 1369, 1371 (5th Cir.1969) Plain error is found, however, if 'the deficient charge is likely responsible for an incorrect verdict which in itself creates a substantial injustice.' *Jamison Co., Inc. v. Westvaco*

> *Corp.*, 526 F.2d 922,, 933 (5th Cir. 1976)." [footnote omitted]

Rodrigue v. Dixilyn Corporation, supra, at 540.

The Ninth Circuit recognizes and applies variants of the "plain error" doctrine. Even though for reasons which arise from practice and docket problems peculiar to the Ninth Circuit, it is more vocal than other Circuits about its reluctance to apply the "plain error" doctrine. The Ninth Circuit's comments in this case and in *Hammer, supra*, that, "There is no plain error exception" are misleading. [Pet. App. 3a] The Ninth Circuit has and does depart from Rule 51 when necessary to prevent a miscarriage of justice.

In four different situations, the Ninth Circuit departs from Rule 51: one, where it is futile to raise the objection in the trial court, *Hammer, supra*, at 847; two, to give effect to an intervening change in the law, *Reed v. Hoy*, 909 F.2d 1421, 1423 (9th Cir. 1990), *rehearing den.*, 909 F.2d 324; three, where the issue is apparent from the way the trial is conducted, *Glover v. BIC Corp.*, 987 F.2d 1410 (9th Cir.1993); and, four, where a party is not allowed a fair opportunity to object, *Stewart v. Ragland*, 934 F.2d 1033, 1042 (9th Cir.1991).

In this case, there are no exceptional circumstances to support application of the

"plain error" doctrine on the facts of the record. Yet, Petitioner contends that "plain error" exists because the trial court allegedly did not "charge any of the elements of [Respondent's] retaliation claim ... " which resulted in a miscarriage of justice." [Pet. 13, 14] Petitioner is wrong. The record shows that the trial court instructed the jury on every essential element of the claim. [ER 65-70; 134-136; Res. App. 1a-10a]

When an instructional error is asserted on appeal to reverse a judgment, the instructions are reviewed as a whole not in isolation. *Reed v. Hoy, supra*, at 1423. Viewing the jury instructions given in this case as a whole, it is clear that the jury was fully and correctly instructed on every essential element of respondent's First Amendment retaliation claim. First, the trial judge instructed on the law applicable to the § 1983 First Amendment retaliation claim and the purpose of the law. [Res. App. 1a] Second, the trial judge instructed on the essential elements of the § 1983 claim, which concluded: "You are required to find only that defendants deprived plaintiffs of liberty without due process of law **in one or more of the ways claimed by plaintiffs.**" [Emphasis added] [Res. App. 2a-3a] Third, the trial judge defined causation and to act knowingly, which read: "An act is done knowingly if done voluntarily and intentionally **and not because of mistake or accident or other innocent reason.**" [Emphasis added] [Res. App. 4a] Fourth, the trial judge

instructed on the meaning of "liberty" and "due process of law." [Res. App. 4a-5a] Fifth, the trial judge gave a standard tort compensatory damage instruction. [Res. App. 5a-7a]. Sixth, and lastly, the trial judge patiently explained the issue specific special verdict forms applicable to the First Amendment retaliation claim. [Res. App. 7a-8a].

Despite the fact the record clearly and convincingly shows the jury was properly instructed on the elements of the First Amendment retaliation claim, petitioner argues that "the jury was given no guidance concerning causation under 42 U.S.C.§ 1983." [Pet. 14] The instructions were well-suited for a mixed motive case, and they were more than adequate to guide the jury to a correct determination of the causation issue. As the instructions permitted, the jury found that petitioner acted "voluntarily and intentionally" to injure respondent and "not because of mistake or accident or other innocent reason." In other words, even if Petitioner had a mixed motive, the jury found that his motive to harm Respondent was the decisive and determinant one. See, *Mt. Healthy City School Board of Educ. v. Doyle*, 429 U.S. 274, 286, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)

Neither the due process of law clause of the Fifth Amendment nor the core principles of fairness which animates its construction entitled petitioner to an issue specific instruction as a matter of

right. [4] As the Court explained in *Montgomery v. Virginia, supra*, at 772:

> " * * * It has long been the rule that, as against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of the case if there is evidence to support it and **if a proper request for such an instruction is made.** * * *" [Citations omitted] [Emphasis added]

Petitioner neither submitted nor requested the trial judge to give an issue specific instruction. Petitioner had ample opportunity to do so. Petitioner was represented by experienced counsel of his choice. The trial judge went through each instruction with counsel in his chambers over a two-day period which comprised 7.25

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4 Petitioner cites *Lassiter v. Department of Social Services*, 452 U.S. 18, 24, 33 (1981), for support for his argument that application of Rule 51 deprived him of a right to a fair trial that the trial became fundamentally unfair. [Pet. 12,13] Petitioner's reliance on *Lassiter* is both misplaced and unfortunate. He does not have a constitutional right to have an instruction submitted to the jury which addressed a specific issue or his theory of the case. He received the very process he was due. He had the opportunity to ask for an additional issue specific instruction; but, he squandered it.

hours. Petitioner did not object to the instructions nor to the proposed special verdict forms. Yet Petitioner here seeks to manufacture a "plain error" theory, unsupported by the record below, in order to transform the "plain error" doctrine into a rescue doctrine which it is not.

"The trial judge has substantial latitude in tailoring jury instructions; challenges are reviewed only for abuse of discretion." *Cooper v. The Firestone Tire and Rubber Company*, 945 F.2d 1103, 1106 (9th Cir. 1991). On the record in this litigation, the trial judge did not commit "plain error" or any other instructional error. Accordingly, the Writ should be denied for there is no error to correct plain or otherwise.

II

THE PETITIONER WAIVED ALL OBJECTIONS TO THE CHALLENGED INSTRUCTIONS AND SPECIAL VERDICT NOT ONLY PURSUANT TO FRCP, RULE 51, BUT ALSO PURSUANT TO FRCP, RULE 49(a).

Rule 49(a) precludes examination on appeal the issue of causation due to petitioner's failure to object to the

special verdict form. [5] Rule 49(a) provides, in part, that:

> If . . . the court omits an issue of fact raised by the pleadings or by the evidence, each party waives the right to trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict. [Res. App. 11a]

Petitioner contends that the causation instructions which the trial court gave were either deficient, in that, they did not adequately focus on the mixed motive issue, or that the jury was not instructed at all on the causation issue. [Pet. 14, 15] However, Petitioner did not object to the special verdict forms. Failure to object to the omission of an issue from a special verdict and jury instructions waives the right to have that issue decided. *McDaniel v. Anheuser-Busch, Inc.*, 987

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5 The issue of causation was submitted to the jury via special verdict form which provided: "Was such conduct a legal cause in bringing about harm or injury to the plaintiff. [Res. App. 9a] The jury answered the question "yes".

F.2d 298 (5th Cir.1993) "When, as here, an issue of causation is omitted from the jury charge and the trial court makes no specific finding regarding cause, that court will be deemed to have found proximate causation if such a finding is supported by the evidence and is consistent with the judgment." *McDaniel v. Anheuser-Busch, Inc., supra*, at 306. [6]

Rule 49(a) gives the trial judge broad discretion to use or not use a special verdict form. The court may use such form whenever it deems it appropriate. *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1373 (9th Cir.1987), quoting and citing, 9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2505, at 493. Here, petitioner's trial counsel made the initial proposal for use of special verdicts and drafted the special verdict forms. [RT: 1582:14-1583:3] Rule 49(a) as well as general principles of estoppel preclude petitioner from challenging the determination of causation.

Petitioner failed to point out to this Court that he utterly failed to satisfy the requirements of FRCP Rule 49(a) and is precluded from raising this very challenge

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6 On Petitioner's motion for JNOV or for new trial, the trial judge expressly found that Petitioner caused Respondent to suffer a constitutional injury and found that Petitioner's conduct towards Respondent was vengeful. [Pet. App. 35a]

on review. As a matter of law, Petitioner is not entitled to any relief. Thus, this Petition for Writ of Certiorari is frivolous. It is brought solely for purposes of delay for which conduct sanctions should be imposed upon Petitioner and his counsel.

III

THERE IS NO NEED TO GRANT THE WRIT BECAUSE PROXIMATE OR LEGAL CAUSATION IS ALREADY A WELL ESTABLISHED, ESSENTIAL ELEMENT OF A §1983 CLAIM AND THE JURY'S CAUSATION FINDING IN THIS ACTION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Proximate Or Legal Cause Standard For §1983 Actions Is Well Established.

Petitioner's proximate causation argument is equally frivolous and meritless because causation was well established on the First Amendment claim below and is already well established in the law. For the first time on appeal to the Ninth Circuit, Petitioner argued that Respondent's § 1983 First Amendment retaliation claim was one for malicious prosecution which failed for lack of proof of the essential elements of that tort. The Ninth Circuit rejected Petitioner's mischaracterization of Respondent's First Amendment claim. The Ninth Circuit ruled that Petitioner's argument was implausible and stated the record throughout the litigation revealed that Respondent's

"claim was construed as one for retaliation." [Pet. App. 3a]

Respondent was not required to prove the elements of a common law tort action for malicious prosecution or false arrest. The elements which comprise a § 1983 constitutional tort claim are determined by federal law, not state law. Favorable termination is not an element of a 1st Amendment claim for retaliation. The action taken by Petitioner, as a state officer, [7] to retaliate against Respondent for expressing his opinion is a constitutional violation which forms the basis for liability under § 1983. [*Mt. Healthy, supra*, 281-86; and [*Duran, supra*, at 1378]

Now, Petitioner attempts to do through the back door what he was not permitted to do through the front door. Petitioner urges this Court to grant the writ to establish that, "A Section 1983 plaintiff must show that the defendant proximately caused the constitutional injury." [Pet. App. 14] For this purpose, there is no need to grant the writ. Proximate or legal cause has long been an essential element of a § 1983 claim. *Monroe v. Pape*, 365 U.S. 167,

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[7] Petitioner had extensive law enforcement training at Modesto Junior College Police Academy, had completed POST training at the Park Ranger Academy, and, as a Park Ranger, had advised campers on the rules and regulations of the park. [RT 601-02]

187 (1961); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986); and *Mt. Healthy, supra*, at 285-87.

Causation under § 1983 is determined "against the background of tort liability that makes a man responsible for the natural consequences of his actions." (*Monroe, supra*, at 187) The ". . . 'basic purpose' of § 1983 damages is '**to compensate persons for injuries**' that are **caused** by the deprivation of constitutional rights;" (*Memphis Community School Dist., supra*, at 307, citing *Carey v. Piphus*, 435 U.S. 254) [Emphasis added]. The causation standard for a First Amendment retaliation claim under § 1983 was enunciated in *Mt. Healthy, supra*, at 285-87. [8]

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8 For such a claim, the plaintiff must show by a preponderance of the evidence that his or her injuries were caused by a constitutional violation, *Mt. Healthy, supra*, at 286. To establish proximate or legal causation, the plaintiff has the burden of proof and persuasion with respect to the following: 1) engagement in protected conduct; and 2) such engagement in protected conduct was a motivating factor in the action taken against him or her, by meeting defendant's evidence, if any, that the same action would have been taken anyway for other innocent reason or reasons *Id.*, at 287.

Prior to *Monroe v. Pape, supra*, the Ninth Circuit required proof of proximate or legal causation in § 1983 actions. *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959), *overruled on other grounds, Cohen v. Norris*, 300 F.2d 24 (9th Cir.1962) "The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir.1978).

Petitioner cites several cases for the position the chain of causation is broken by the action of an independent body. *Margoles v. Tormey*, 643 F.2d 1292 (7th Cir.1982), *cert. denied*, 452 U.S. 939 (1981); *Hand v. Gary*, 838 F.2d 1420 (5th Cir. 1988); *McLaughlin v. Alban*, 775 F.2d 389 (D.C.Cir. 1985); and *Ames v. United States*, 600 F.2d 183 (8th Cir.1979) [Pet. 15] Whether or not the chain of causation is broken by the action of an independent body is initially one of fact to be decided on a case-by-case basis. In this action, both the jury and the trial judge found against Petitioner. On Petitioner's motion for JNOV or for new trial, the trial judge expressly found: "That Ranger Sereno's conduct is a concurrent cause in no way absolves him of liability for such vengeful conduct." [Pet. App. 35a] The Ninth Circuit agreed this critical finding was supported by

substantial evidence. [Pet. App. 3a] The jury's finding, which embodies its resolution of credibility issues, is not to be revisited under the guise of Petitioner's invitation to this Court to make law where none is needed.

B. The Causation Finding In This Case Was Supported By Substantial Evidence.

The jury finding that Petitioner was the moving force in the chain of events which led to the criminal complaint against Respondent is supported by substantial evidence, as it is based, in part, upon Petitioner's admission. [RT 596:15-23; 597:5-10] During the trial, Petitioner was forced to admit that "we pursued the complaint through the District Attorney's office." [RT 596:15-23; 597:5-10] Deciding Petitioner's post trial motions, the trial judge agreed with the jury's finding, stating that:

> "The prosecutorial discretion of the District Attorney that most directly resulted in the issuance of the complaint in no way abrogates the causal contribution of Ranger Sereno's request for a criminal complaint as a substantial factor in the criminal prosecution of Mr. Nievera, the direct consequences of which were to cause Mr. Nievera out of pocket damage." [Pet. App. 35a; ER 192].

The institution of the criminal complaint against Respondent was directly traceable to Ranger Sereno. *Dellums v. Powell, supra*, at 194-95. Petitioner set in motion a chain of events which led to criminal charges against Respondent. Petitioner is liable for the natural consequences of his acts. Liability under § 1983 is determined "against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape, supra*, at 187. [9]

Contrary to Petitioner's argument, the chain of causation is not broken when a state officer provides false information to an intermediary who exercises independent judgment to pursue criminal charges. *Ames v. United States, supra*, at 185. Providing false or misleading information extends the "chain of causation." *Dellums v. Powell*, 184 U.S.App.D.C. 275, 566 F.2d 167, 192-93 (D.C.Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). Where, as here, the Reporting Officer knowingly submits false information to the prosecutor the presumption of

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9 In the real world of law enforcement, it is unlikely an independent prosecutor in California was so eager to prosecute this case that he or she would charge Respondent without outside prompting and then dismiss the charges without obtaining a plea or a fine.

independence is overcome. *Smiddy v. Varney*, 803 F.2d 1469, 1471 (9th Cir. 1986).

Petitioner's reliance on the District Court decision in *Grove School v. Guardianship and Advocacy Com'n*, 596 F.Supp. 1361 (N.D.Ill. E.D. 1984), is misplaced. Petitioner cited language from *Grove School* which held that since the ultimate decision maker was free to disregard information supplied by defendants the defendants were not liable for losses it incurred. [596 F.Supp., at 1369] That language was critical to *Grove School's* due process claims, and not to its First Amendment claims. *Grove School's* First Amendment claims survived the motion to dismiss. [596 F.Supp., *supra*, at 1365-66]

Respondent's § 1983 claim for retaliation was not a common law tort law claim for malicious prosecution. It was a claim brought pursuant to § 1983 for violation of his 1st Amendment rights. Section 1983 provides a right of action for "any action to punish or deter" the exercise of First Amendment rights. *Duran v. City of Douglas, Arizona*, 904 F.2d 1372, 1378 (9th Cir. 1990). Respondent's § 1983 claim is derived directly from the Constitution for violation of his First Amendment rights. *Mt. Healthy, supra*, at 281-86 (1977). The right of action provides a remedy for state action intended to punish any person "for conduct that is not merely lawful, but protected by the First Amendment." [*Duran, supra*, at 1378].

As a matter of law, Respondent's speech was entitled to First Amendment protection. He had a right to express his belief to Petitioner that he and other family members were being evicted from the campsite for racial reasons. As was stated in *Hill v. City of Houston*, 789 F.2d 1103, at 1113 (5th Cir. 1986), *aff'd, sub. nom., Hill v. City of Houston, supra*: "The first amendment was designed to shield pesky, irritating, and contentious people, even busybodies and troublemakers." The verdict in favor of Respondent gives practical expression to this fundamental principle of our free society. The verdict is supported by substantial evidence. Petitioner fails to show the existence of special or important reasons to disturb it.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: February 17, 1994

Respectfullysubmitted,

HOWARD MOORE, JR.
(Counsel of Record)
PETER GRAHAM COHN
CHARLES W. KIM, JR.

Attorneys for Respondent

APPENDIX

RESPONDENT'S APPENDIX A
EXCERPTS FROM JURY INSTRUCTIONS GIVEN

JURY INSTRUCTION NO. 17

42 U.S.C. SECTION 1983

The next claim before you is based on Section 1983 of Title 42 of the United States Code which provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."
[RT: 1596-1597]

JURY INSTRUCTION NO. 18

SECTION 1983 PURPOSE

Section 1983 creates a form of liability in favor of persons who have been deprived of rights, privileges and immunities secured to them by the United States Constitution and federal statutes. Before Section 1983 was enacted in 1871, people so injured were not able to sue state officials or persons acting under color of state law for money damages in Federal Court. In enacting the statute, Congress intended to create a remedy as

broad as the protection provided by the Fourteenth Amendment to the United States Constitution and federal laws.

Section 1983 was enacted to give people a federal remedy enforceable in Federal Court because of concern that adequate protection of federal rights might not be available in State Courts. [RT: 1597]

JURY INSTRUCTION NO. 19

ESSENTIAL ELEMENTS OF PLAINTIFFS' 1983 CLAIM

In order to prove their claim, the burden is upon the plaintiffs to establish, by a preponderance of the evidence in the case, the following facts: First, that the defendants Sereno, Selover, and Lee knowingly and unlawfully restricted or interfered with plaintiffs' liberty interests by unlawfully evicting plaintiffs from Lake McSwain.

As to defendants Hogan, Bibby, and Paige, that said defendants knowingly participated in the wrongful restraint and interference with the liberty interests of plaintiffs by wrongfully evicting plaintiffs from Lake McSwain.

Second, that the defendants' acts and conduct deprived the plaintiffs of their federal constitutional right not to be denied or deprived of his or her liberty without due process of law.

Third, that the defendants' acts and conduct was the legal cause of plaintiffs' humiliation, embarrassment, or mental anguish.

The parties have stipulated; therefore, it is established that the defendants in this case acted under color of law of the State of California.

The plaintiffs also claim punitive damages for the 1983 violation that is alleged. Punitive damages I have already explained to you. To establish their claim, plaintiffs must show by a preponderance of the evidence that one or more of the defendants deprived one or more of the plaintiffs of their liberty without due process of law in at least one of the ways claimed by the plaintiffs; that is, plaintiffs must establish by a preponderance of the evidence that defendants unlawfully restricted or interfered with plaintiffs' liberty interests by evicting them from Lake McSwain.

You do not have to find that defendants acted on the basis of race for the 1983 claim. You are required to find only that defendants deprived plaintiffs of liberty without due process of law in one or more of the ways claimed by plaintiffs. [RT: 1597-1599]

JURY INSTRUCTION NO. 20

LEGAL CAUSE - DEFINITION OF

I used the term "legal cause." A legal cause of injury or harm is a cause which is a substantial factor in bringing about the injury or harm. [RT: 1599]

JURY INSTRUCTION NO. 21

TO ACT "KNOWINGLY" DEFINED

I have used the term "knowingly." An act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason. [RT: 1599]

JURY INSTRUCTION NO. 22
"LIBERTY," "DUE PROCESS OF LAW" DEFINED

As stated before, the Fourteenth Amendment to the United States Constitution provides that no state shall deprive any person of his liberty or her liberty without due process of law.
The plaintiffs in this case, in common with the defendants and all other persons living under the protection of our Constitution, have the legal right at all times not to be deprived, without due process of law, of any liberty interest secured to him or her or protected by the statutes or laws of the United States.

To be deprived of a liberty interest "without due process of law" means to be deprived of liberty without the authority

of the law. Before the jury can determine, then, whether or not the plaintiff was deprived by the defendants of any liberty interest under the Federal Constitution "without due process of law," you must first determine, from a preponderance of the evidence in the case, whether the defendants knowingly did the acts alleged and, if so, whether, under the circumstances shown by the evidence in the case, the defendants acted within or without the bounds of their lawful authority under state law. If the defendants acted within the limits of their lawful authority under the state law, then the defendants could not have deprived the plaintiff of any liberty "without due process of law." The court finds and instructs you that the state law applicable in this case meets the requirements of the Federal Constitution. [RT: 1599-1600]

JURY INSTRUCTION NO. 24

§ 1983 DAMAGES

I'm now going to refer to damages, and just because I instruct you on how damages are awarded and how to calculate them does not mean that I have an opinion on whether or not the defendants should be held liable or whether you should award damages.

If you return a verdict for the plaintiffs, then you must consider the issue of actual damages. If you return a verdict for the plaintiffs, then you must award them such sum of money as you believe will fairly and justly compensate them for any injury you believe they actually sustained as a direct consequence of the

conduct of the defendants. You shall award actual damages only for those injuries which you find that plaintiffs have proven by a preponderance of the evidence. Moreover, you shall award actual damages only for those injuries which you find plaintiffs have proven by a preponderance of the evidence to have been a direct result of conduct by the defendants in violation of Section 1983.

You may not simply award damages for any injury suffered by plaintiffs. You must award actual damages only for those injuries that are a direct result of actions by these defendants and that are direct result of conduct by defendants which violated plaintiffs' federal rights under color of law.

Actual damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial, and only on that evidence.
[RT: 1603-1604]

JURY INSTRUCTION NO. 37

COMPENSATORY DAMAGES

If, under the instructions I have given you, you find that plaintiffs are entitled to a verdict against any of the defendants, you must then award plaintiffs damages, economic and non-economic, depending on the particular claim, in an amount that will reasonably compensate them for each of the following elements of claimed harm or loss, providing that you find that such harm or loss was suffered by him or her and legally caused by the act or

omission upon which you base your finding of liability.

The term "economic damages" means objectively verifiable monetary losses, including the cost of legal representation for defending against a criminal complaint, and the loss of earnings. The term "non-economic" damages means subjective, nonmonetary losses, including, but not limited to, dishonor, disgrace, embarrassment, inconvenience, mental suffering, emotional distress and humiliation. [RT: 1610-1611]

TRIAL COURT'S INSTRUCTIONS RE: SPECIAL VERDICT FOR JAIME NIEVERA'S FIRST AMENDMENT CLAIM

I'm going to show you now the verdicts forms and go through them briefly with you before I let you go for the evening. ... The way the verdict forms have been structured is tó go through the claims. ... [RT: 1728]

As to one plaintiff you will have three more questions to answer. You won't have these questions on all the other verdict forms, and that you will see it when you look at the verdict form. It will be self-explanatory.

As to Mr. Jaime Nievera, you have the question of whether there was a wrongful retaliation for his verbally protesting the alleged interference with plaintiffs' liberty interests and/or their eviction by the filing of a criminal incident report or the seeking of the criminal charges against Mr. Nievera. That

is only as to two of the defendants whose names are here, Vincent Sereno and Roger Hogan. Your finding is yes or no. And, again, whether that was a cause of harm to Mr. Nievera, if you should find that the conduct occurred, yes or no, and then whether or not there are damages, and then two more questions as to whether or not you find that the conduct was sufficient to warrant punitive and exemplary damages, and finally the amount of any exemplary damages.

We also have included instructions that tell you as you are answering to go to the next question, and so I'm confident that these are self-explanatory.
[RT: 1731-1732]

EXCERPT OF SPECIAL VERDICT
RE: PLAINTIFF JAIME NIEVERA[10]

1st Amendment U.S. Constitutional Claim

Question No. 18: Did any defendant wrongfully retaliate against Jaime Nievera for verbally protesting the alleged interference with plaintiffs' liberty interests and/or their eviction from Lake McSwain by filing a criminal incident report or seeking criminal charges against Mr. Nievera?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Defendant Vincent Sereno	X	
	Defendant Roger Hogan		X

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10 ER 134-136.

If you answered Question No. 18 "yes" as to any defendant, answer Question No. 19 as to that defendant.

Question No. 19: Was such conduct a legal cause in bringing about harm or injury to the plaintiff?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Defendant Vincent Sereno	X	
	Defendant Roger Hogan		X

If you answered Questions No. 18 and 19 "yes" as to any defendant, answer Questions No. 20 through 22.

Question No. 20: What is the amount of damages, if any, suffered by the plaintiff as a result of this violation?

Answer: $ 4,500

Question No. 21: Did any such individual defendant act with an evil motive or a callous disregard or indifference to the plaintiff's rights?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Defendant Vincent Sereno		X
	Defendant Roger Hogan		X

Question No. 22: What amount of damages, if any, is the plaintiff entitled to against each such defendant for the sake of example and by way of punishment?

Insert an amount after the name of each such individual defendant.

Answer: Defendant Vincent Sereno $ none
Defendant Roger Hogan $ none

Dated: November 7, 1991

/s/
Foreperson

RESPONDENT'S APPENDIX B
EXCERPTS FROM
U.S. CONSTITUTION AND FRCP

FIRST AMENDMENT TO THE U.S. CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FED.R.CIV.P.49(a)

SPECIAL VERDICTS. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to

an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

No. 93-1157

FEB 2 2 1994

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

VINCENT SERENO,

Petitioner,

v.

EDUARDO PACUMIO, et al.,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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ISSUES PRESENTED FOR REVIEW

Whether Petitioner's assertion of a conflict among the Circuits with respect to enforcement of FRCP Rule 51 is nothing more than a frivolous and meritless effort on the part of the Petitioner to inappropriately avoid his responsibility for the judgment below.

Whether Petioner, a state officer, who the jury found to have violated the 1st Amendment rights of Respondent-Plaintiff Jaime Nievera, can obtain relief from a special jury verdict on that constitutional violation after trial when Petitioner never preserved an objection to the instructions or special verdict and waived his right to a jury trial on all issues relevant to the 1st Amendment claim pursuant to FRCP Rule 49(a).

Whether Petitioner, who agreed to try a case as a 1st Amendment civil rights

case, agreed upon the jury instructions and the special verdict form without objection and then lost, can obtain relief from the jury verdict and the requirements of FRCP Rule 51 by simply recasting the case as a state malicious prosecution case and asserting a failure on the part of the District Court to instruct on the newly asserted malicious prosecution claim before the Ninth Circuit; and by now asserting a failure to instruct on the 1st Amendment claim in this Court.

LIST OF PARTIES
TO THE PROCEEDING
IN THE U.S. COURT OF APPEALS

VINCENT SERENO,

Appellant,

JAIME NIEVERA,

Appellee,

EDUARDO PACUMIO; NENITA PACUMIO; PATRICK and ROY PACUMIO, Minors, by their Guardian Ad Litem, Eduardo Pacumio; DANILO EVANGELISTA; JISELA EVANGELISTA; JAY and JASON EVANGELISTA, Minors, by their Guardian Ad Litem, Danilo Evangelista; FELICITO TORRES; SALUSTIA TORRES; LESTER and MERILEE TORRES, Minors, by their Guardian Ad Litem, Felicito Torres; JAIME NIEVERA; TITA NIEVERA; TERRELL and JAIMELENE NIEVERA, Minors, by their Guardian Ad Litem, Jaime Nievera; FELICITO NER; ANGELITA NER; JUSTIN NER, A Minor, by his Guardian Ad Litem, Felicito Ner; AUGUSTO GABRIEL, JR.; PRISCILA GABRIEL; ALEXANDER and LOUIE GABRIEL, Minors, by their Guardian Ad Litem, Augusto Gabriel, Jr.; ANTONIO PILAPIL; and VIRGINIA PILAPIL,

Cross-Appellants,

VINCENT SERENO; REID SELOVER; ED LEE; ROGER HOGAN; JOEL BIBBY; and FRED PAIGE,

Cross-Appellees.

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No. 93-1157

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

VINCENT SERENO,

Petitioner,

v.

EDUARDO PACUMIO, et al.,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

Jaime Nievera, the Respondent herein, hereby opposes the petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in *Pacumio v.*

Sereno, No. 92-15290, issued on October 5, 1993.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The First Amendment to the United States Constitution is set out in the Appendix [Res. App. B, at 17a, *infra*].

Rule 49(a) of the Federal Rules of Civil Procedure also is set out in the Appendix [Res. App. B, at 17a, *infra*].

STATEMENT OF THE CASE

This is a frivolous and meritless Petition for Writ of Certiorari. There are neither special nor important reasons to grant this Petition for Writ of Certiorari. The Ninth Circuit has not rendered a decision that is in conflict with the other circuits with respect to FRCP, Rule 51. In any event, Petitioner has utterly failed to preserve any objection to the challenged instructions not only pursuant to FRCP,

Rule 51, but also pursuant to FRCP, Rule 49(a).

At the trial below, the jury returned a special verdict on behalf of Respondent Jaime Nievera that Petitioner Park Ranger Sereno violated his 1st Amendment rights, to wit, "by wrongfully retaliating against him for verbally protesting the alleged interference with plaintiffs' liberty interests and/or their eviction from Lake McSwain by filing a criminal incident report or seeking criminal charges against Mr. Nievera...." [Special Jury Verdict, Res. App. A, pp. 13a-16a; ER 134-35]. In short, after protesting the eviction of himself along with twenty-four other Filipino family members and friends, [1]

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1 Mr. Nievera's family and friends are law abiding citizens who were candidly filmed on videotape on the afternoon of July 15, 1989 [Respondent's Trial Exhibit #1 - SER 295]. The District Court in its ruling on

Mr. Nievera was forced to defend a false and meritless criminal allegation of assault by Sereno. As a result of this constitutional violation, the jury awarded Mr. Nievera $4,500 in damages, including $3,500 for attorney fees to defend the criminal prosecution, and $1,000 for loss

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Count 1 at the trial below underscored this in two significant findings: 1) "The evidence has well established that the plaintiffs are law-abiding and good citizens of the United States, none of them ever having had any prior adverse experience with the law, criminal or civil." [SER 318:14-18]; 2) "A videotape in evidence shows activities of the plaintiff[s] that did not appear to involve excessive noise, did not appear to involve any types of unlawful behavior and did not involve any violations of the criminal law of the state or of the park regulations." [SER 319:15-20] There was also substantial evidence that Plaintiffs below are productive citizens holding positions of public service and those, who happen to be children, are aspiring to responsible careers. [RT: 743-746, 837-838, 257-258, 242-244, 940-942, 963-965, 284-285, 300-302, 165-166, 60-63, 312-313, 327-329, 1016-1020, 1092-1094, 340-341, 355-357, 1148-1149, 1209-1212, 367-368, 898-901. 915-917, 1204, 386-388, 708-710, and 630-631]

wages and emotional distress damages. [Res. App. A, p. 15a; RT: 1045]

Significantly, prior to the jury being instructed and retiring, there was an extended jury instruction and special verdicts conference with counsel for the parties and the District Court that lasted for no less than seven and a quarter hours and occurred over two days. [RT:1574:17-23] The initial proposal for special verdicts was made by and drafted by the defendants. [RT:1582:14-1583:3] Additionally, the trial judge at least twice invited counsel for Mr. Sereno for comments either to the jury instructions or the special verdicts. However, the Petitioner's counsel made no objection to either the jury instructions or the special verdicts with respect to the 1st Amendment claim. [RT: 1578:1-1582:4] Petitioner acknowledges on the face of the petition

his failure to preserve any objection to the relevant instructions and jury verdicts. [Pet. pp. i and 7] On the record there was no preservation of any challenge to the instructions or special verdicts pursuant to either FRCP, Rule 51 or FRCP, Rule 49(a).

After trial, Petitioner moved for judgment notwithstanding the verdict or new trial asserting, *inter alia*, his own first amendment right of free speech. However, consistent with the verdict, the District Court found that there is no First Amendment privilege for knowingly false speech; that Sereno sought the criminal complaint against Mr. Nievera [RT 134:23-24]; and that Sereno's request for the criminal complaint was the legal cause of Mr. Nievera having to travel to a remote and distant Mariposa County far from his home in the Bay Area to defend a meritless

criminal case, incurring legal defense fees and losing wages; and that Sereno's conduct was a concurrent cause of the prosecution in no way absolves him of liability for such vengeful conduct. [Pet. App. C, pp. 33a-35a] These findings as well as the jury verdict were supported by substantial evidence. [Pet. App. C, p.36a]

Petitioner misrepresented the nature of the case before the Ninth Circuit in hopes of obtaining relief from the jury verdict below by recasting the case as a malicious prosecution case. However, there was no state malicious prosecution claim in the complaint [Excerpts of Record "ER" 1-14]. Nor was such a claim tried during the course of the proceedings below as underscored by the District Court's Pre-Trial Order [Supplemental Excerpts of Record "SER" 256-280] which does not list malicious prosecution as an issue for

trial. Similarly, there was no jury verdict identifying a malicious prosecution claim for the jury to decide. [ER 125-136] On the contrary, the language that Petitioner attempted to persuade the Ninth Circuit into believing was a malicious prosecution claim was in fact the jury verdict with respect to the 1st Amendment U.S. Constitutional Claim.[2]

The Ninth Circuit agreed with the District Court and Mr. Nievera that his claim was and has always been for unlawful retaliation against the exercise of his first amendment rights. Further, the Ninth Circuit rejected Petitioner's argument that there was insufficient evidence to support the claim and found that there was sufficient evidence for the jury to

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[2] See Special Jury Verdict for Jaime Nievera's 1st Amendment U.S. Constitutional Claim [Res. App. A, pp.13a-16a; ER 134-135]

conclude that Sereno filed a false report to punish and to retaliate against Nievera for protesting the eviction. [9th Circuit 10-5-93 Memorandum, Pet. App. A, p. 3a]

This Petition is yet another effort to obfuscate what occurred below and to obtain relief from a jury verdict that is solidly based on facts and law. Petitioner now suggests to this Court that there was no instruction with respect to the 1st Amendment §1983 claim; and there was a failure of proof that Sereno's conduct caused the constitutional injury to Mr. Nievera. However, viewing the jury instructions as a whole and the special jury verdict, it is clear that no instructional error occurred and both the special verdict and judgment were supported by substantial evidence. [Res. App. A, pp. 1a-16a]

REASONS FOR DENYING THE WRIT

I

CONTRARY TO THE REPRESENTATION MADE IN THE PETITION, THE NINTH CIRCUIT HAS NOT RENDERED A DECISION THAT IS IN CONFLICT WITH THE OTHER CIRCUITS WITH RESPECT TO THE ENFORCEMENT OF FRCP, RULE 51.

The Ninth Circuit and every other Circuit Court of Appeals apply Rule 51, Federal Rules of Civil Procedure, to bar litigation of objections to jury instructions raised for the first time on appeal. *Hammer v. Gross*, 932 F.2d 842 (9th Cir.1991), *cert. denied, sub nom., City of Newport Beach California v. Hammer*, ___ U.S. ___, 112 S.Ct. 582 (1991). [3] The pertinent part of Rule 51

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3 Even the cases cited by Petitioner to show existence of the exception reveal the universal and longstanding application of Rule 51. *Morris v. Travisono*, 528 F.2d 856 (1st Cir.1976); *MacEdward v. Northern Electric Co., Ltd.*, 595 F.2d 105 (2nd Cir. 1979): *Choy v. Rouchelle*, 436 F.2d 319 (1970); *Furka v. Great Lakes Dredge & Dock Company, Inc.*, 755 F.2d 1085 (4th Cir.1985); *Rodrigue v. Dixilyn Corporation*, 620 F.2d 537 (5th Cir.1980); *Ivey v. Wilson*, 832

provides: "No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds for the objection."

Rule 51 is a rule of preclusion, which promotes the adjudicative ideals of Rule 1 to attain "the just, speedy, and inexpensive determination of every action." It "was designed to prevent unnecessary new trials caused by errors in instructions that the district court could have corrected if they had been brought to its

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F2d 950 (6th Cir.1987); *Shearson v. Leach*, 583 F.2d 367 (1987); *Beckman v. Mayo Foundation*, 804 F.2d 435 (8th Cir.1986); *Ryder v. The City of Topeka*, 814 F.2d 1412 (10th Cir.1987); *Pate v. Seaboard Railroad, Inc.*, 819 F.2d 1074 (11th Cir.1987); *Montgomery v. Virginia*, 191 F.2d 770 (D.C.Cir.1951); and *Lummus Industries, Inc. v. D. M.& E Corporation*, 862 F.267 (Fed Cir.1988). [Pet. 10]

attention at the proper time." *Robinson v. Heilman*, 563 F.2d 1304, 1306 (9th Cir.1977) A party who fails to object to the inclusion of an incorrect charge or the omission of a correct one waives the objection and is precluded from litigating the issue on appeal. *Woodbridge v. Dahlberg*, 954 F.2d 1231 (6th Cir.1992)

Rule 51 is a salutary rule of trial and appellate practice, which conforms to general trial and appellate practice. As stated in *Palmer v. Hoffman*, 318 U.S. 109, 119, 63 S.Ct. 477, 87 L.Ed. 645 (1943):

> In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial.

FRCP Rule 51, like Rule 30 of the Federal Rules of Criminal Procedure, requires a timely objection to preserve an instructional error but courts are less willing to forgive noncompliance. Appellate courts generally hold that the failure to make a timely objection and distinctly point out the matter to which the objection is directed bars a party from raising the issue on appeal. See cases cited in footnote 3; *Seltzer v. Chesley*, 512 F.2d 1030 (9th Cir. 1975); and *Standard Oil Co. of Calif. v. Perkins*, 347 F.2d 379 (9th Cir. 1965).

Even in criminal cases, application of the "plain error" doctrine is the exception rather than the rule. "Plain error arises only in **exceptional circumstances** where we find that the trial court's decision affected substantial rights and where it is 'highly probable that the error materially

affected the verdict.'" *United States v. Span*, 970 F.2d 573, (9th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1283 (1992). [Emphasis added]

In civil cases, the so-called "plain error" doctrine is a judicially created exception to Rule 51. All Circuit Courts of Appeals, including the Ninth Circuit, sparingly apply a variant of the "plain error" doctrine in exceptional circumstances to prevent a miscarriage of justice. In an appropriate case, the "plain error" exception is invoked to "correct the mistake made by court and counsel below." *Rodrigue v. Dixilyn Corporation*, *supra*, at 540.

> "The doctrine is not a routine by-pass to Rule 51, however. The criterion for application of this doctrine is 'certainly not whether [this] court approves or does not disapprove the results of the case.' *Shepard Federal Credit Union v. Palmer*, 408 F.2d 1369, 1371

> (5th Cir.1969) Plain error is found, however, if 'the deficient charge is likely responsible for an incorrect verdict which in itself creates a substantial injustice.' *Jamison Co., Inc. v. Westvaco Corp.*, 526 F.2d 922,, 933 (5th Cir. 1976)." [footnote omitted]

Rodrigue v. Dixilyn Corporation, supra, at 540.

The Ninth Circuit recognizes and applies variants of the "plain error" doctrine. Even though for reasons which arise from practice and docket problems peculiar to the Ninth Circuit, it is more vocal than other Circuits about its reluctance to apply the "plain error" doctrine. The Ninth Circuit's comments in this case and in *Hammer, supra*, that, "There is no plain error exception" are misleading. [Pet. App. 3a] The Ninth Circuit has and does depart from Rule 51 when necessary to prevent a miscarriage of justice.

In four different situations, the Ninth Circuit departs from Rule 51: one, where it is futile to raise the objection in the trial court, *Hammer, supra*, at 847; two, to give effect to an intervening change in the law, *Reed v. Hoy*, 909 F.2d 1421, 1423 (9th Cir. 1990), *rehearing den.*, 909 F.2d 324; three, where the issue is apparent from the way the trial is conducted, *Glover v. BIC Corp.*, 987 F.2d 1410 (9th Cir.1993); and, four, where a party is not allowed a fair opportunity to object, *Stewart v. Ragland*, 934 F.2d 1033, 1042 (9th Cir.1991).

In this case, there are no exceptional circumstances to support application of the "plain error" doctrine on the facts of the record. Yet, Petitioner contends that "plain error" exists because the trial court allegedly did not "charge any of the elements of [Respondent's] retaliation

claim ... " which resulted in a miscarriage of justice." [Pet. 13, 14] Petitioner is wrong. The record shows that the trial court instructed the jury on every essential element of the claim. [ER 65-70; 134-136; Res. App. 1a-16a]

When an instructional error is asserted on appeal to reverse a judgment, the instructions are reviewed as a whole not in isolation. *Reed v. Hoy, supra*, at 1423. Viewing the jury instructions given in this case as a whole, it is clear that the jury was fully and correctly instructed on every essential element of respondent's First Amendment retaliation claim. First, the trial judge instructed on the law applicable to the § 1983 First Amendment retaliation claim and the purpose of the law. [Res. App. 1a-3a] Second, the trial judge instructed on the essential elements of the § 1983 claim, which concluded: "You

are required to find only that defendants deprived plaintiffs of liberty without due process of law **in one or more of the ways claimed by plaintiffs.**" [Emphasis added] [Res. App. 3a-5a] Third, the trial judge defined causation and to act knowingly, which read: "An act is done knowingly if done voluntarily and intentionally **and not because of mistake or accident or other innocent reason.**" [Emphasis added] [Res. App. 5a-6a] Fourth, the trial judge instructed on the meaning of "liberty" and "due process of law." [Res. App. 6a-8a] Fifth, the trial judge gave a standard tort compensatory damage instruction. [Res. App. 8a-11a]. Sixth, and lastly, the trial judge patiently explained the issue specific special verdict forms applicable to the First Amendment retaliation claim. [Res. App. 11a-16a].

Despite the fact the record clearly and convincingly shows the jury was properly instructed on the elements of the First Amendment retaliation claim, petitioner argues that "the jury was given no guidance concerning causation under 42 U.S.C.§ 1983." [Pet. 14] The instructions were well-suited for a mixed motive case, and they were more than adequate to guide the jury to a correct determination of the causation issue. As the instructions permitted, the jury found that petitioner acted "voluntarily and intentionally" to injure respondent and "not because of mistake or accident or other innocent reason." In other words, even if Petitioner had a mixed motive, the jury found that his motive to harm Respondent was the decisive and determinant one. See, *Mt. Healthy City School Board of Educ. v. Doyle*, 429

U.S. 274, 286, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

Neither the due process of law clause of the Fifth Amendment nor the core principles of fairness which animates its construction entitled petitioner to an issue specific instruction as a matter of right. [4] As the Court explained in *Montgomery v. Virginia, supra*, at 772:

> " * * * It has long been the rule that, as against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of the case if there is evidence to

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4 Petitioner cites *Lassiter v. Department of Social Services*, 452 U.S. 18, 24, 33 (1981), for support for his argument that application of Rule 51 deprived him of a right to a fair trial that the trial became fundamentally unfair. [Pet. 12,13] Petitioner's reliance on *Lassiter* is both misplaced and unfortunate. He does not have a constitutional right to have an instruction submitted to the jury which addressed a specific issue or his theory of the case. He received the very process he was due. He had the opportunity to ask for an additional issue specific instruction; but, he squandered it.

> support it and **if a proper request for such an instruction is made.** * * *" [Citations omitted] [Emphasis added]

Petitioner neither submitted nor requested the trial judge to give an issue specific instruction. Petitioner had ample opportunity to do so. Petitioner was represented by experienced counsel of his choice. The trial judge went through each instruction with counsel in his chambers over a two-day period which comprised 7.25 hours. Petitioner did not object to the instructions nor to the proposed special verdict forms. Yet Petitioner here seeks to manufacture a "plain error" theory, unsupported by the record below, in order to transform the "plain error" doctrine into a rescue doctrine which it is not.

"The trial judge has substantial latitude in tailoring jury instructions; challenges are reviewed only for abuse of

discretion." *Cooper v. The Firestone Tire and Rubber Company*, 945 F.2d 1103, 1106 (9th Cir. 1991). On the record in this litigation, the trial judge did not commit "plain error" or any other instructional error. Accordingly, the Writ should be denied for there is no error to correct plain or otherwise.

II

THE PETITIONER WAIVED ALL OBJECTIONS TO THE CHALLENGED INSTRUCTIONS AND SPECIAL VERDICT NOT ONLY PURSUANT TO FRCP, RULE 51, BUT ALSO PURSUANT TO FRCP, RULE 49(a).

Rule 49(a) precludes examination on appeal the issue of causation due to petitioner's failure to object to the special verdict form. [5] Rule 49(a) provides, in part, that:

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5 The issue of causation was submitted to the jury via special verdict form which provided: "Was such conduct a legal cause in bringing about harm or injury to the plaintiff. [Res. App. 14a] The jury answered the question "yes".

> If . . . the court omits an issue of fact raised by the pleadings or by the evidence, each party waives the right to trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict. [Res. App. 18a]

Petitioner contends that the causation instructions which the trial court gave were either deficient, in that, they did not adequately focus on the mixed motive issue, or that the jury was not instructed at all on the causation issue. [Pet. 14, 15] However, Petitioner did not object to the special verdict forms. Failure to object to the omission of an issue from a special verdict and jury instructions waives the right to have that issue decided. *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298 (5th Cir.1993) "When, as here, an

issue of causation is omitted from the jury charge and the trial court makes no specific finding regarding cause, that court will be deemed to have found proximate causation if such a finding is supported by the evidence and is consistent with the judgment." *McDaniel v. Anheuser-Busch, Inc., supra*, at 306. [6]

Rule 49(a) gives the trial judge broad discretion to use or not use a special verdict form. The court may use such form whenever it deems it appropriate. *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1373 (9th Cir.1987), quoting and citing, 9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2505, at 493. Here,

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6 On Petitioner's motion for JNOV or for new trial, the trial judge expressly found that Petitioner caused Respondent to suffer a constitutional injury and found that Petitioner's conduct towards Respondent was vengeful. [Pet. App. 35a]

petitioner's trial counsel made the initial proposal for use of special verdicts and drafted the special verdict forms. [RT: 1582:14-1583:3] Rule 49(a) as well as general principles of estoppel preclude petitioner from challenging the determination of causation.

Petitioner failed to point out to this Court that he utterly failed to satisfy the requirements of FRCP Rule 49(a) and is precluded from raising this very challenge on review. As a matter of law, Petitioner is not entitled to any relief. Thus, this Petition for Writ of Certiorari is frivolous. It is brought solely for purposes of delay for which conduct sanctions should be imposed upon Petitioner and his counsel.

III

THERE IS NO NEED TO GRANT THE WRIT BECAUSE PROXIMATE OR LEGAL CAUSATION IS ALREADY A WELL ESTABLISHED, ESSENTIAL ELEMENT OF A §1983 CLAIM AND THE JURY'S CAUSATION FINDING IN THIS ACTION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Proximate Or Legal Cause Standard For §1983 Actions Is Well Established.

Petitioner's proximate causation argument is equally frivolous and meritless because causation was well established on the First Amendment claim below and is already well established in the law. For the first time on appeal to the Ninth Circuit, Petitioner argued that Respondent's § 1983 First Amendment retaliation claim was one for malicious prosecution which failed for lack of proof of the essential elements of that tort. The Ninth Circuit rejected Petitioner's mischaracterization of Respondent's First Amendment claim. The Ninth Circuit ruled that Petitioner's argument was implausible

and stated the record throughout the litigation revealed that Respondent's "claim was construed as one for retaliation." [Pet. App. 3a]

Respondent was not required to prove the elements of a common law tort action for malicious prosecution or false arrest. The elements which comprise a § 1983 constitutional tort claim are determined by federal law, not state law. Favorable termination is not an element of a 1st Amendment claim for retaliation. The action taken by Petitioner, as a state officer, [7] to retaliate against Respondent for expressing his opinion is a constitutional violation which forms the

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[7] Petitioner had extensive law enforcement training at Modesto Junior College Police Academy, had completed POST training at the Park Ranger Academy, and, as a Park Ranger, had advised campers on the rules and regulations of the park. [RT 601-02]

basis for liability under § 1983. [*Mt. Healthy, supra*, 281-86; and *Duran, supra*, at 1378]

Now, Petitioner attempts to do through the back door what he was not permitted to do through the front door. Petitioner urges this Court to grant the writ to establish that, "A Section 1983 plaintiff must show that the defendant proximately caused the constitutional injury." [Pet. App. 14] For this purpose, there is no need to grant the writ. Proximate or legal cause has long been an essential element of a § 1983 claim. *Monroe v. Pape*, 365 U.S. 167, 187 (1961); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986); and *Mt. Healthy, supra*, at 285-87.

Causation under § 1983 is determined "against the background of tort liability that makes a man responsible for the natural consequences of his actions."

(*Monroe, supra*, at 187) The ". . . 'basic purpose' of § 1983 damages is 'to compensate persons for injuries' that are caused by the deprivation of constitutional rights;" (*Memphis Community School Dist., supra*, at 307, citing *Carey v. Piphus*, 435 U.S. 254) [Emphasis added]. The causation standard for a First Amendment retaliation claim under § 1983 was enunciated in *Mt. Healthy, supra*, at 285-87. [8]

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8 For such a claim, the plaintiff must show by a preponderance of the evidence that his or her injuries were caused by a constitutional violation, *Mt. Healthy, supra*, at 286. To establish proximate or legal causation, the plaintiff has the burden of proof and persuasion with respect to the following: 1) engagement in protected conduct; and 2) such engagement in protected conduct was a motivating factor in the action taken against him or her, by meeting defendant's evidence, if any, that the same action would have been taken anyway for other innocent reason or reasons *Id.*, at 287.

Prior to *Monroe v. Pape, supra*, the Ninth Circuit required proof of proximate or legal causation in § 1983 actions. *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959), *overruled on other grounds, Cohen v. Norris*, 300 F.2d 24 (9th Cir.1962) "The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir.1978).

Petitioner cites several cases for the position the chain of causation is broken by the action of an independent body. *Margoles v. Tormey*, 643 F.2d 1292 (7th Cir.1982), *cert. denied*, 452 U.S. 939 (1981); *Hand v. Gary*, 838 F.2d 1420 (5th Cir. 1988);

McLaughlin v. Alban, 775 F.2d 389 (D.C.Cir. 1985); and *Ames v. United States*, 600 F.2d 183 (8th Cir.1979) [Pet. 15] Whether or not the chain of causation is broken by the action of an independent body is initially one of fact to be decided on a case-by-case basis. In this action, both the jury and the trial judge found against Petitioner. On Petitioner's motion for JNOV or for new trial, the trial judge expressly found: "That Ranger Sereno's conduct is a concurrent cause in no way absolves him of liability for such vengeful conduct." [Pet. App. 35a] The Ninth Circuit agreed this critical finding was supported by substantial evidence. [Pet. App. 3a] The jury's finding, which embodies its resolution of credibility issues, is not to be revisited under the guise of Petitioner's invitation to this Court to make law where none is needed.

B. The Causation Finding In This Case Was Supported By Substantial Evidence.

The jury finding that Petitioner was the moving force in the chain of events which led to the criminal complaint against Respondent is supported by substantial evidence, as it is based, in part, upon Petitioner's admission. [RT 596:15-23; 597:5-10] During the trial, Petitioner was forced to admit that "we pursued the complaint through the District Attorney's office." [RT 596:15-23; 597:5-10] Deciding Petitioner's post trial motions, the trial judge agreed with the jury's finding, stating that:

> "The prosecutorial discretion of the District Attorney that most directly resulted in the issuance of the complaint in no way abrogates the causal contribution of Ranger Sereno's request for a criminal complaint as a substantial factor in the criminal prosecution of Mr. Nievera, the direct consequences of which were to cause Mr. Nievera out of pocket damage."

[Pet. App. 35a; ER 192].

The institution of the criminal complaint against Respondent was directly traceable to Ranger Sereno. *Dellums v. Powell, supra*, at 194-95. Petitioner set in motion a chain of events which led to criminal charges against Respondent. Petitioner is liable for the natural consequences of his acts. Liability under § 1983 is determined "against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape, supra*, at 187. [9]

Contrary to Petitioner's argument, the chain of causation is not broken when a

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9 In the real world of law enforcement, it is unlikely an independent prosecutor in California was so eager to prosecute this case that he or she would charge Respondent without outside prompting and then dismiss the charges without obtaining a plea or a fine.

state officer provides false information to an intermediary who exercises independent judgment to pursue criminal charges. *Ames v. United States, supra*, at 185. Providing false or misleading information extends the "chain of causation." *Dellums v. Powell*, 184 U.S.App.D.C. 275, 566 F.2d 167, 192-93 (D.C.Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). Where, as here, the Reporting Officer knowingly submits false information to the prosecutor the presumption of independence is overcome. *Smiddy v. Varney*, 803 F.2d 1469, 1471 (9th Cir. 1986).

Petitioner's reliance on the District Court decision in *Grove School v. Guardianship and Advocacy Com'n*, 596 F.Supp. 1361 (N.D.Ill. E.D. 1984), is misplaced. Petitioner cited language from *Grove School* which held that since the ultimate decision maker was free to disregard information supplied by

defendants the defendants were not liable for losses it incurred. [596 F.Supp., at 1369] That language was critical to *Grove School's* due process claims, and not to its First Amendment claims. *Grove School's* First Amendment claims survived the motion to dismiss. [596 F.Supp., *supra*, at 1365-66]

Respondent's § 1983 claim for retaliation was not a common law tort law claim for malicious prosecution. It was a claim brought pursuant to § 1983 for violation of his 1st Amendment rights. Section 1983 provides a right of action for "any action to punish or deter" the exercise of First Amendment rights. *Duran v. City of Douglas, Arizona*, 904 F.2d 1372, 1378 (9th Cir. 1990). Respondent's § 1983 claim is derived directly from the Constitution for violation of his First Amendment rights. *Mt. Healthy, supra*, at 281-86 (1977). The right of

action provides a remedy for state action intended to punish any person "for conduct that is not merely lawful, but protected by the First Amendment." [*Duran, supra*, at 1378].

As a matter of law, Respondent's speech was entitled to First Amendment protection. He had a right to express his belief to Petitioner that he and other family members were being evicted from the campsite for racial reasons. As was stated in *Hill v. City of Houston*, 789 F.2d 1103, at 1113 (5th Cir. 1986), *aff'd, sub. nom., Hill v. City of Houston, supra*: "The first amendment was designed to shield pesky, irritating, and contentious people, even busybodies and troublemakers." The verdict in favor of Respondent gives practical expression to this fundamental principle of our free society. The verdict is supported by substantial evidence. Petitioner fails to

show the existence of special or important reasons to disturb it.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: February 17, 1994

Respectfully submitted,

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(Counsel of Record)
PETER GRAHAM COHN
CHARLES W. KIM, JR.

Attorneys for Respondent

APPENDIX

RESPONDENT'S APPENDIX A
EXCERPTS FROM JURY INSTRUCTIONS GIVEN

JURY INSTRUCTION NO. 17

42 U.S.C. SECTION 1983

The next claim before you is based on Section 1983 of Title 42 of the United States Code which provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." [RT: 1596-1597]

JURY INSTRUCTION NO. 18

SECTION 1983 PURPOSE

Section 1983 creates a form of liability in favor of persons who have been deprived of rights, privileges and immunities secured to them by the United States Constitution and federal statutes. Before Section 1983 was enacted in 1871, people so injured were not able to sue state officials or persons acting under color of state law for money damages in Federal Court. In enacting the statute, Congress intended to create a remedy as broad as the protection provided by the Fourteenth Amendment to the United States Constitution and federal laws.

Section 1983 was enacted to give people a federal remedy enforceable in Federal Court because of concern that adequate protection of federal rights might

not be available in State Courts. [RT: 1597]

JURY INSTRUCTION NO. 19

ESSENTIAL ELEMENTS OF PLAINTIFFS' 1983 CLAIM

In order to prove their claim, the burden is upon the plaintiffs to establish, by a preponderance of the evidence in the case, the following facts: First, that the defendants Sereno, Selover, and Lee knowingly and unlawfully restricted or interfered with plaintiffs' liberty interests by unlawfully evicting plaintiffs from Lake McSwain.

As to defendants Hogan, Bibby, and Paige, that said defendants knowingly participated in the wrongful restraint and interference with the liberty interests of plaintiffs by wrongfully evicting plaintiffs from Lake McSwain.

Second, that the defendants' acts and conduct deprived the plaintiffs of their federal constitutional right not to be denied or deprived of his or her liberty without due process of law.

Third, that the defendants' acts and conduct was the legal cause of plaintiffs' humiliation, embarrassment, or mental anguish.

The parties have stipulated; therefore, it is established that the defendants in this case acted under color of law of the State of California.

The plaintiffs also claim punitive damages for the 1983 violation that is alleged. Punitive damages I have already explained to you. To establish their claim, plaintiffs must show by a preponderance of the evidence that one or more of the defendants deprived one or more of the plaintiffs of their liberty without

due process of law in at least one of the ways claimed by the plaintiffs; that is, plaintiffs must establish by a preponderance of the evidence that defendants unlawfully restricted or interfered with plaintiffs' liberty interests by evicting them from Lake McSwain.

You do not have to find that defendants acted on the basis of race for the 1983 claim. You are required to find only that defendants deprived plaintiffs of liberty without due process of law in one or more of the ways claimed by plaintiffs. [RT: 1597-1599]

JURY INSTRUCTION NO. 20

LEGAL CAUSE - DEFINITION OF

I used the term "legal cause." A legal cause of injury or harm is a cause which is a substantial factor in bringing about the injury or harm. [RT: 1599]

JURY INSTRUCTION NO. 21

TO ACT "KNOWINGLY" DEFINED

I have used the term "knowingly." An act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason. [RT: 1599]

JURY INSTRUCTION NO. 22

"LIBERTY," "DUE PROCESS OF LAW" DEFINED

As stated before, the Fourteenth Amendment to the United States Constitution provides that no state shall deprive any person of his liberty or her liberty without due process of law.

The plaintiffs in this case, in common with the defendants and all other persons living under the protection of our Constitution, have the legal right at all times not to be deprived, without due process of law, of any liberty interest secured to him or her

or protected by the statutes or laws of the United States.

To be deprived of a liberty interest "without due process of law" means to be deprived of liberty without the authority of the law. Before the jury can determine, then, whether or not the plaintiff was deprived by the defendants of any liberty interest under the Federal Constitution "without due process of law," you must first determine, from a preponderance of the evidence in the case, whether the defendants knowingly did the acts alleged and, if so, whether, under the circumstances shown by the evidence in the case, the defendants acted within or without the bounds of their lawful authority under state law. If the defendants acted within the limits of their lawful authority under the state law, then the defendants could not have deprived the

plaintiff of any liberty "without due process of law." The court finds and instructs you that the state law applicable in this case meets the requirements of the Federal Constitution. [RT: 1599-1600]

JURY INSTRUCTION NO. 24

§ 1983 DAMAGES

I'm now going to refer to damages, and just because I instruct you on how damages are awarded and how to calculate them does not mean that I have an opinion on whether or not the defendants should be held liable or whether you should award damages.

If you return a verdict for the plaintiffs, then you must consider the issue of actual damages. If you return a verdict for the plaintiffs, then you must award them such sum of money as you believe will fairly and justly compensate them for any injury you believe they actually sustained as a direct consequence of the

conduct of the defendants. You shall award actual damages only for those injuries which you find that plaintiffs have proven by a preponderance of the evidence. Moreover, you shall award actual damages only for those injuries which you find plaintiffs have proven by a preponderance of the evidence to have been a direct result of conduct by the defendants in violation of Section 1983.

You may not simply award damages for any injury suffered by plaintiffs. You must award actual damages only for those injuries that are a direct result of actions by these defendants and that are direct result of conduct by defendants which violated plaintiffs' federal rights under color of law.

Actual damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial,

and only on that evidence.

[RT: 1603-1604]

JURY INSTRUCTION NO. 37

COMPENSATORY DAMAGES

If, under the instructions I have given you, you find that plaintiffs are entitled to a verdict against any of the defendants, you must then award plaintiffs damages, economic and non-economic, depending on the particular claim, in an amount that will reasonably compensate them for each of the following elements of claimed harm or loss, providing that you find that such harm or loss was suffered by him or her and legally caused by the act or omission upon which you base your finding of liability.

The term "economic damages" means objectively verifiable monetary losses, including the cost of legal representation for defending against a criminal complaint,

and the loss of earnings. The term "non-economic" damages means subjective, nonmonetary losses, including, but not limited to, dishonor, disgrace, embarrassment, inconvenience, mental suffering, emotional distress and humiliation. [RT: 1610-1611]

TRIAL COURT'S INSTRUCTIONS RE: SPECIAL VERDICT FOR JAIME NIEVERA'S FIRST AMENDMENT CLAIM

I'm going to show you now the verdicts forms and go through them briefly with you before I let you go for the evening. ... The way the verdict forms have been structured is to go through the claims. ... [RT: 1728]

As to one plaintiff you will have three more questions to answer. You won't have these questions on all the other verdict forms, and that you will see it

when you look at the verdict form. It will be self-explanatory.

As to Mr. Jaime Nievera, you have the question of whether there was a wrongful retaliation for his verbally protesting the alleged interference with plaintiffs' liberty interests and/or their eviction by the filing of a criminal incident report or the seeking of the criminal charges against Mr. Nievera. That is only as to two of the defendants whose names are here, Vincent Sereno and Roger Hogan. Your finding is yes or no. And, again, whether that was a cause of harm to Mr. Nievera, if you should find that the conduct occurred, yes or no, and then whether or not there are damages, and then two more questions as to whether or not you find that the conduct was sufficient to warrant punitive and exemplary damages, and

finally the amount of any exemplary damages.

We also have included instructions that tell you as you are answering to go to the next question, and so I'm confident that these are self-explanatory.

[RT: 1731-1732]

EXCERPT OF SPECIAL VERDICT RE: PLAINTIFF JAIME NIEVERA[10]

1st Amendment U.S. Constitutional Claim

Question No. 18: Did any defendant wrongfully retaliate against Jaime Nievera for verbally protesting the alleged interference with plaintiffs' liberty interests and/or their eviction from Lake McSwain by filing a criminal incident report or seeking criminal charges against Mr. Nievera?

---

10 ER 134-136.

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Defendant Vincent Sereno	X	___
	Defendant Roger Hogan	___	X

If you answered Question No. 18 "yes" as to any defendant, answer Question No. 19 as to that defendant.

Question No. 19: Was such conduct a legal cause in bringing about harm or injury to the plaintiff?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Defendant Vincent Sereno	X	___
	Defendant Roger Hogan	___	X

If you answered Questions No. 18 and 19 "yes" as to any defendant, answer Questions No. 20 through 22.

Question No. 20: What is the amount of damages, if any, suffered by the plaintiff as a result of this violation?

Answer: $ 4,500

Question No. 21: Did any such individual defendant act with an evil motive or a callous disregard or indifference to the plaintiff's rights?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Defendant Vincent Sereno	___	X
	Defendant Roger Hogan	___	X

Question No. 22: What amount of damages, if any, is the plaintiff entitled to against each such defendant for the sake of example and by way of punishment?

Insert an amount after the name of each such individual defendant.

Answer: Defendant Vincent Sereno $ none

Defendant Roger Hogan $ none

Dated: November 7, 1991

/s/
Foreperson

RESPONDENT'S APPENDIX B
EXCERPTS FROM
U.S. CONSTITUTION AND FRCP

FIRST AMENDMENT TO THE U.S. CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FED.R.CIV.P.49(a)

SPECIAL VERDICTS. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use

such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

SUPREME COURT, U.S.
FEB 28 1994
OFFICE OF THE CLERK

No. 93-1157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

VINCENT SERENO,

Petitioner,

v.

EDUARDO PACUMIO, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Petitioner's Reply Memorandum

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ARGUMENT

1. Respondents ask this Court to disbelieve the Ninth Circuit's assertion in this case that "there is no 'plain error' exception in civil cases in this circuit." Opp. at 11, quoting Pet. App. at 2a, quoting *Hammer v. Gross*, 932 F.2d 842, 847 (9th Cir.) (en banc) (plurality), *cert. denied*, ___U.S.___, 112 S. Ct. 582, 116 L. Ed. 2d 607 (1991). Respondents call the Ninth Circuit's statement "misleading," and cite four cases for the proposition that the "Ninth Circuit has and does depart from Rule 51 when necessary to prevent a miscarriage of justice." Opp. at 11.

Respondents misstate those four holdings of the Ninth Circuit, which do not recognize a plain error exception when a party has failed to object to flawed jury instructions. In *Stewart v. Ragland*, 934 F.2d 1033, 1042 (9th Cir. 1991), for example,

the defendant objected to the instruction at issue but the trial court refused to consider the objection.

Hammer v. Gross, *supra*, and *Glover v. BIC Corp.*, 987 F.2d 1410, 1418-20 (9th Cir. 1993), recognized that an objection has been preserved when "the trial court is aware of the party's concerns with an instruction and further objection would be unavailing." 932 F.2d at 847. In other words, if counsel effectively objected to the instruction the Ninth Circuit will not require further objection. That is hardly a plain error exception to Rule 51 for cases, like this one, where a party has raised no objection at all. *Compare McNello v. John B. Kelly, Inc.*, 283 F.2d 96, 102-03 (3d Cir. 1960) (reversing for plain error in jury instruction despite counsel's abject failure to object); *Furka v. Great Lakes Dredge & Dock Co.*, 755 F.2d 1085, 1089 (4th Cir.) (same), *cert. denied*, 474 U.S. 846 (1985); *Pate v. Seaboard R.R., 819 F.2d 1074, 1082-83 (11th Cir. 1987) (same; distinguishing case from separate exception to Rule 51 in situations where "further objection would have been unavailing").*

Finally, *Reed v. Hoy*, 909 F.2d 324, 330 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 2887 (1991), expressed agreement with a substantive holding of the Second Circuit that a specific instruction constituted "plain error." But the Ninth Circuit panel immediately noted in a footnote that the plaintiff in the case before it had "properly objected" to the disputed instruction. *Id.*, at 330 n.4.

2. Respondents assert that "the jury was fully and correctly instructed on every essential element of respondent's First Amendment retaliation claim." Opp. at 12. That is not true. The jury instructions focused on respondent's unsuccessful claim that they were wrongfully evicted from the campground. Pet. App. 39a-40a; Opp. at 1a-8a. The trial court did not explain whether the jury had to determine if Ranger Sereno's report of Nievara's assault was false, or how to determine if the report was "wrongful," or what standard of causation applied. Indeed,

the instructions mentioned the First Amendment claim only once, and then only to explain how the jurors were to fill out the special verdict form. Opp. at 7a-8a.

3. Respondents argue that this Court need not address whether the proximate cause standard should apply to actions under 42 U.S.C. § 1983, because proximate cause "has long been an essential element of a § 1983 claim." Opp. at 19. To support this erroneous proposition, respondents misread this Court's precedents. Respondents cite a passage of *Monroe v. Pape*, 365 U.S. 167, 187 (1961), that dealt with the question of intent, not proximate cause. Respondents also point to a passage in *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986), which concerned the measure of damages for a § 1983 claim, not causation. Finally, *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977), formulated a test of causation for cases involving mixed motives, but did not address the causation requirement when there is an independent intervening decisionmaker. *Mt. Healthy* is consistent with our position here, in contrast to a footnote in *Malley v. Briggs*, 475 U.S. 335, 344, n.7 (1986), which suggested in dicta that the presence of an independent decisionmaker would not break the causal chain. Accordingly, this Court should address the application of proximate cause to this case.[1]

[1] Although respondents dispute the application here of *Grove Sch. v. Guardianship and Advocacy Comm'n*, 596 F. Supp 1361 (N.D. Ill. 1984) to this case, its causation analysis under § 1983 remains directly relevant.

For all of the reasons stated in our Petition and this Reply, the writ of certiorari should be granted.

Respectfully submitted,

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Date: February 28, 1994